90-1127

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RAILWAY LABOR EXECUTIVES' ASSOCIATION and
UNITED TRANSPORTATION UNION,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

CHICAGO AND NORTH WESTERN TRANSPORTATION CO.,
ITEL CORPORATION and FRVR CORPORATION,
Intervenors.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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Date: January 14, 1991

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 15, 1990 Decided September 14, 1990

Nos. 88-1793 & 89-1183

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA,
Respondents

CHICAGO AND NORTHWESTERN TRANSPORTATION CO., ITEL CORP., FRVR CORP.,
Intervenors

Petitions for Review of Orders of the Interstate Commerce Commission

---

Richard S. Edelman, with whom *William G. Mahoney* and *John O'B. Clarke, Jr.* were on the brief, for petitioner in both cases.

Clyde J. Hart, Jr., Attorney, Interstate Commerce Commission ("ICC"), with whom *Robert S. Burk*, General Counsel, *Henri F. Rush*, Deputy General Counsel, ICC, *James F. Rill*, Assistant Attorney General, *John J. Powers III*, and *Robert J. Wiggers*, Attorneys, Department of Justice, were on the brief, for respondents in

both cases. *John J. McCarthy*, Attorney, ICC, also entered an appearance for respondents.

Fritz R. Kahn, with whom *Russell E. Pommer*, *Stuart F. Gassner*, *Myles L. Tobin*, and *Ralph J. Moore, Jr.* (for Chicago and North Western Transportation Co.), and *John M. Nannes*, *Carl V. Lyon*, and *Stephen M. Olson* (for Itel Corp. and Itel Rail Corp.) were on intervenors' joint brief, argued on behalf of intervenors in No. 88-1793.

John M. Nannes, with whom *Carl V. Lyon* and *Stephen M. Olson* (for FRVR Corp.) and *Fritz R. Kahn*, *Russell E. Pommer*, *Stuart F. Gassner*, *Myles L. Tobin*, and *Ralph J. Moore, Jr.* (for Chicago and North Western Transportation Co.) were on intervenors' joint brief, argued on behalf of intervenors in No. 89-1183.

L. John Osborn also entered an appearance for intervenor Chicago and North Western Transportation Co.

Before BUCKLEY, WILLIAMS, and D.H. GINSBURG, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* BUCKLEY.

BUCKLEY, *Circuit Judge*: In these related cases, the Railway Labor Executives' Association and the United Transportation Union (collectively, "RLEA") seek review of two decisions of the Interstate Commerce Commission concerning, first, the FRVR Corporation's acquisition of certain rail lines from the Chicago and North Western Transportation Company ("CNW") and, second, the continued control of FRVR by Itel Rail Corporation and its parent, Itel Corporation. The effect of these decisions was to deny the imposition of labor protection conditions for the benefit of CNW's employees. The RLEA contends that the transactions were structured deliberately to evade employee protection, and that the ICC should have looked to the "true nature" of the transactions and disregarded certain "formalities of corporate

structure." We conclude that the ICC's interpretation of the relevant statutes was permissible and that their application to the facts of these cases is consistent with the agency's own prior decisions and supported by circuit precedent.

I. Background

A. Statutory Background

Section 10901 of the Interstate Commerce Act has been held to require the ICC's approval of the acquisition or operation of a rail line by an entity that is not a rail carrier. *See* 49 U.S.C. § 10901 (1982); *Black v. ICC*, 762 F.2d 106, 111, 115 (D.C. Cir. 1985); *In re Chicago, M., St. P. & Pac. R.R.*, 658 F.2d 1149, 1169-70 (7th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982). Under section 10901, the Commission must find "that the present or future public convenience and necessity require or permit" the acquisition and operation of the line. 49 U.S.C. § 10901(a). Section 10901(e) gives the Commission the discretion to impose certain protective conditions for affected employees. *Id.* § 10901(e). The Commission has generally refrained from imposing labor protection in section 10901 cases unless exceptional circumstances are shown, and we have upheld the Commission's exercise of that discretion. *See, e.g., Black*, 762 F.2d at 116-17.

A different section of the Act, section 11343, governs certain transactions involving two or more rail carriers. 49 U.S.C. § 11343 (1982). As relevant here, section 11343 requires the ICC's prior approval and authorization for the "acquisition of control of a carrier by a person that is not a carrier but that controls any number of carriers." 49 U.S.C. § 11343(a)(5).

Any transaction governed by section 11343 is also subject to the labor protection requirements of section 11347, which provides in relevant part as follows:

> When a rail carrier is involved in a transaction for which approval is sought [pursuant to § 11343],

> the Interstate Commerce Commission *shall* require the carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction as [terms previously imposed by statute]. Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees . . . .

49 U.S.C. § 11347 (emphasis added). Thus, for transactions uner section 11343, employee protection is mandatory, while under section 10901, it is discretionary. The statutory minimum employee protective arrangements mandated by section 11347 are extensive and include preservation of collective bargaining rights, reemployment rights, severance pay, continuation of fringe benefits, and the like. *See, e.g., New York Dock Ky. v. United States*, 609 F.2d 83 (2d Cir. 1979).

The final provision relevant here in section 10505, under which the ICC is obliged to exempt from prior approval requirements "a person, class of persons, or a transaction or service" if certain findings are made, primarily that regulation "is not necessary ot carry out the transportation policy of" the Interstate Commerce Act. 49 U.S.C. § 10505(a) (1982). Such an exemption, however, may not operate to "relieve a carrier of its obligation to protect the interests of employees as required by" the Interstate Commerce Act. *Id.* § 10505(g).

B. Factual and Procedural Background

Itel Rail Corporation, a subsidiary of Itel Corporation, directly and indirectly controls several rail carriers. The FRVR Corporation, a wholly owned subsidiary of Itel Rail, was formed in 1987 as the vehicle for the rail lines described below. Prior to that acquisition, FRVR had not engaged in any rail operations and was not subject to ICC regulation.

In 1987, FRVR entered into an agreement to purchase the Duck Creek South lines, consisting of about 200

miles of line and incidental trackage rights located between Green Bay and Milwaukee, Wisconsin, from the Chicago and North Western Transportation Company. These are essentially feeder lines for CNW as well as several other railroads; they compete with both motor carriers and a rail carrier. The purchase price was approximately $61 million, of which $14 million was provided by an equity contribution from Itel or Itel Rail, and $47 million by a loan secured by the acquired assets and guaranteed by Itel Rail.

Among Itel Rail's other subsidiaries is the Green Bay & Western Railroad Company ("GB&W"), which operates some 250 miles of track running across the state of Wisconsin between East Winona and Green Bay. As a result of FRVR's purchase of the Duck Creek South lines, FRVR and GB&W will connect at Green Bay, and this connection will permit GB&W to interchange traffic with CNW at Milwaukee.

Although it is a subsidiary of Itel Rail, FRVR has its own employees, management, and equipment, and it publishes its own tariffs and operates under its own name. One of FRVR's officers and directors is an officer of Itel Rail, and another, an employee. The remaining officers and directors were formerly associated with GB&W. None of the FRVR officers or directors is an officer or director of Itel.

As a non-carrier acquiring a rail line, FRVR was required pursuant to section 10901 to obtain ICC approval of the Duck Creek South purchase, unless it could secure an exemption from the requirement under section 10505. On December 23, 1987, FRVR and CNW applied for the exemption, which automatically became effective under certain class-wide procedures established by the Commission.

In subsequent proceedings, the RLEA challenged FRVR's exemption from prior ICC approval under sec-

tion 10901, arguing that section 10901 was not applicable to the Duck Creek transaction. The RLEA asserted that FRVR should not have been considered a non-carrier because it was formed for the primary purpose of avoiding the imposition of employee protection under sections 11343 and 11347 and because it was not sufficiently independent of Itel Rail and its subsidiaries, particularly GB&W. The RLEA thus urged that the Commission disregard the "formalities of corporate structure," revoke the exemption, and proceed instead under section 11343, which would trigger the mandatory employee protection under section 11347.

On February 21, 1989, the Commission denied the RLEA's petition for revocation of FRVR's exemption. *FRVR Corporation—Acquisition and Operation Exemption—Chicago and North Western Transportation Company*, Finance Docket No. 31205 (I.C.C. Feb. 21, 1989) ("Acquisition Decision"). At the outset, the Commission declined to impose labor protection under the discretionary "exceptional circumstances" standard of section 10901, a decision the RLEA does not contest. Acquisition Decision at 6. Turning to the RLEA's arguments, the Commission found that FRVR operated independently of its parent and affiliated carriers and that it had not been created for the sole purpose of evading section 1347's labor protection provisions; therefore, its application was properly considered under section 10901. *Id.* at 6-8. Petitioners seek review of the Acquisition Decision in No. 89-1183.

In the meantime, because FRVR would become a carrier subject to ICC regulation upon consummation of its purchase of the Duck Creek South lines, it became necessary for Itel and Itel Rail to assure themselves of the continued right to control FRVR. Accordingly, on December 24, 1987, they filed a petition pursuant to section 10505 for an exemption from the prior approval and other provisions of section 11343 and for authority to

combine control over FRVR with Itel Rail's control over its existing carrier subsidiaries. The Commission granted the exemption and imposed labor protective conditions as required by section 11347, but failed to specify explicitly whose employees would be protected by them.

Following that decision, the RLEA filed a petition for reopening for clarification or reconsideration, urging that the protective conditions be applied to the CNW employees on the Duck Creek South lines. The RLEA argued that Itel Rail's continued control of FRVR was inextricably linked to FRVR's acquisition of CNW's line, as there would be no need for the control authorization without the acquisition, and thus that labor protection must apply to the Duck Creek South employees because they are "employees who are affected by the transaction" at issue in the common control arrangement. Itel, FRVR, and CNW opposed the petition.

In a decision issued on September 12, 1988, the ICC declared that it would not impose labor protection for the benefit of CNW's employees. *Itel Rail Corporation and Itel Corporation—Continuance in Control Exemption—FRVR Corporation*, Finance Docket No. 31206 (I.C.C. Sept. 6, 1988) ("Control Decision"). The Commission explained that CNW was not a party to the control transaction that was the subject of the exemption, that CNW's employees were not directly affected by it, and that the only employees entitled to labor protection under section 11347 were those of the Itel system. Control Decision at 3. The Commission thus "rejected the argument that employee protection should be extended to employees of nonapplicant carriers." *Id.* In effect, then, the Commission viewed the acquisition of Duck Creek South and the continued control of FRVR as two entirely separate transactions governed by different statutory provisions; the ICC reasoned that only the acquisition transaction "even possibly could have a direct and allegedly adverse effect on CNW employees." *Id.* The RLEA petitions for review of the Control Decision in No. 88-1793.

We address the two petitions together to consider the RLEA's contention that the Control and Acquisition Decisions present interrelated transactions and legal issues. As we find, however, that the ICC properly viewed the transactions as separate, we discuss the two decisions in turn.

II. Discussion

This case turns on the permissibility of the ICC's statutory interpretations. Where, as here, the statute is silent or ambiguous with respect to a specific issue, a reviewing court must defer to the agency's interpretation so long as it is reasonable, even if the court might have taken a different view. *Continental Air Lines v. Department of Transp.*, 843 F.2d 1444, 1449 (D.C. Cir. 1988); *see Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 & n.11 (1984). The Commission's decisions themselves, applying the law to the facts of a particular case, will be set aside only if they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See* 5 U.S.C. § 706(2) (1988); *see also Central States Enters. v. ICC*, 780 F.2d 664, 673-74 (7th Cir. 1985).

A. Control Decision

In challenging the Control Decision, petitioners argue that within the meaning of section 11347, CNW was "involved" in Itel's continued control of FRVR and CNW's employees were "affected by" the control transaction such that they were entitled to labor protection. In petitioners' view, the control and acquisition proceedings were two necessary and mutually dependent steps in a single transaction; for example, FRVR's acquisition of CNW's line was dependent upon Itel Rail's continued control of FRVR because Itel Rail's equity contribution and loan guarantee had financed the purchase. The underlying allegation, of course, is that Itel created FRVR so that Duck Creek South could be acquired by a non-carrier,

thus qualifying the acquisition for section 10901 treatment, preventing CNW from being a party to the control proceeding, and thereby avoiding mandatory labor protection under section 11343. Therefore, petitioners assert, the Commission should have looked to the true nature and practical effects of the transaction, from which perspective CNW was certainly "involved" in, and its employees "affected by," the control transaction.

Whatever Itel's supposed ulterior motives may have been, the Commission's view that section 11347 does not require labor protection for employees of nonapplicant carriers like CNW is firmly supported by previous decisions in this and other circuits. *See Lamoille Valley R.R. v. ICC*, 711 F.2d 295, 323-24 (D.C. Cir. 1983); *Southern Pacific Transp. Co. v. ICC*, 736 F.2d 708, 725 (D.C. Cir. 1984) (adopting holding and reasoning of *Lamoille Valley*), *cert. denied*, 469 U.S. 1208 (1985); *see also Missouri-Kansas-Texas R.R. v. United States*, 632 F.2d 392, 410-12 (5th Cir. 1980), *cert. denied*, 451 U.S. 1017 (1981); *Crounse Corp. v. ICC*, 781 F.2d 1176, 1192-93 (6th Cir.), *cert. denied*, 479 U.S. 890 (1986).

In *Lamoille Valley*, we reviewed the Commission's approval of a merger of the Maine Central Railroad with the Boston & Maine Railroad pursuant to section 11343. The Commission imposed labor protection for employees of the merging carriers but not for those of competing railroads who might lose their jobs as a result of the merger. We affirmed the ICC's interpretation of section 11347 "as requiring it to protect only employees of the merging railroads and not employees of other railroads." 711 F.2d at 323.

Petitioners nonetheless argue that *Lamoille Valley* and the other cases we have cited are distinguishable in that they relate only to whether labor protection in the case of a merger should be extended to employees of competitors, and not to the particular facts before us. Those

cases cannot be so narrowly limited. Although it is true that protection was sought for employees of competitors, the decisions are not predicated on that fact. In *Lamoille Valley*, for example, we looked first to the language of the statute and reasoned as follows:

> The second sentence of § 11,347 provides that "the arrangement may be made by *the rail carrier* and the authorized representative of *its* employees." (Emphasis added.) The phrase "the rail carrier" presumably refers back to the preceding sentence and thus includes only "a rail carrier . . . involved in the transaction." But an arrangement between "a rail carrier involved in the transaction" and "its employees" will not protect employees of other carriers. Thus, Congress must not have contemplated protecting employees of nonapplicant railroads.

Id. In addition, we explained that the Commission's interpretation was supported by the legislative history, by "considerations of practicality and administrative economy," by the consistency of the Commission's view of section 11347 since its original enactment in 1940, and by the precedent of other courts. *Id.* at 323-24. None of this reasoning distinguishes employees of competitors from those of non-applicants generally; all of it supports the Commission's contention that CNW's employees are not entitled to the protections of section 11347 for the compelling reason that CNW was not a party to the control proceeding.

Finally, even if the prior cases did not definitively address whether under section 11347 a non-applicant carrier could ever be sufficiently "involved" in a transaction for which approval is sought to trigger labor protection for "affected" employees, we conclude that the ICC's interpretation of "involved" to mean only those who formally participate as parties to a transaction is reasonable. *See Chevron*, 467 U.S. at 843 & n.11. We do not decide whether a control transaction might be structured

in such a way as to include as parties to "the transaction" entities that are neither the controlled nor the controlling party, and would thus not be applicants before the Commission. Petitioners have not challenged the Commission's finding that CNW was not "a party to the control transaction" and consequently the issue is not before us. Accordingly, we affirm the Control Decision.

B. Acquisition Decision

The RLEA also seeks review of the Acquisition Decision, in which the Commission concluded that FRVR's purchase of Duck Creek South was an acquisition by a non-carrier, thus subject to section 10901. The RLEA argues, again, that the formalities of corporate structure —here, the use of a newly created subsidiary to make the purchase—should not be allowed to obscure the true nature and practical effects of the transactions. According to the RLEA, the acquisition of Duck Creek South should have been treated as a section 11343 transaction because of the relationship among the various Itel entities and because FRVR was created largely for the purpose of evading the labor protection provisions of section 11347.

In addressing petitioners' charge that FRVR was effectively the "alter ego" of Itel, the Commission asserted that to sustain their argument, they must

> show[] [either] that FRVR was created exclusively for the purpose of evading the labor protection requirements of section 11347 or that FRVR is not a separate entity because it is not sufficiently independent of its parent or affiliated carriers.

Acquisition Decision at 6. The Commission found that petitioners had failed the first test because the record confirmed that FRVR had been formed for legitimate and substantial business reasons that were unrelated to the labor issue. It also found that there were sufficient indicia of the subsidiary's financial and operational independence

to justify classifying it as a non-carrier, citing *Railway Labor Executives' Ass'n v. ICC*, 819 F.2d 1172 (D.C. Cir. 1987) ("*RLEA v. ICC*"), and *Railway Labor Executives' Ass'n v. United States*, 791 F.2d 994 (2d Cir. 1986) ("*RLEA v. U.S.*"), as authority for this conclusion.

These cases amply support the Commission's analysis of the independence factor. In *RLEA v. ICC*, we reviewed a Commission grant of an exemption from prior approval for a non-carrier's acquisition of a rail line. The acquirer, the Rochester and Southern Railroad, was a wholly owned subsidiary of Genesee and Wyoming Industries, Inc., which also owned two rail carriers that would have benefited from the acquisition. As in this case, the corporations had some common officers and directors, and the acquisition by Rochester and Southern was financed in part by an equity contribution from its parent. Nevertheless, Rochester and Southern would own and operate the line itself, publish its own tariffs, directly serve the acquired line's patrons, assume responsibility for its own financial and contractual obligations, purchase its own equipment, and hire its own employees. *See* 819 F.2d at 1172-73; *Rochester and Southern R.R. and Genesee and Wyoming Industries, Inc.—Exemption from 49 U.S.C. 10901, 11301, and 11343*, Finance Docket No. 30779 (I.C.C. June 27, 1986), at 2, 5. In affirming the Commission's determination that Rochester and Southern was an independent corporate entity, we explained:

> Where, as here, a subsidiary is financially independent of its parent corporation *and* is not financially guaranteed by the parent . . . the ICC is not *compelled* to ignore corporation formalities, but may instead decide each case on its own facts, treating related entities as separate where, in its judgment, the facts demonstrate sufficient indicia of independence.

819 F.2d at 1173 (emphasis in original). We then concluded that the ICC's analysis of Rochester and South-

ern's independence was reasonable and supported by the facts. *Id.*

The Second Circuit reached the same conclusion on similar facts in *RLEA v. U.S.*, 791 F.2d at 1006, which we cited with approval in our *RLEA v. ICC* decision. *See RLEA v. ICC*, 819 F.2d at 1173. There, the parent company guaranteed its subsidiary's financial obligations to the selling carrier in connection with the purchase of approximately thirty-one miles of track and trackage rights. The guarantee did not, however, extend to any obligations that the subsidiary might incur in the operation of the newly acquired line. Looking to the "indicia" of independence" of the subsidiary, the court affirmed the Commission's conclusion that the subsidiary was independent and thus a non-carrier, explaining that with the exception of the initial purchase guarantee, the subsidiary "ha[d] assumed all of the risks of the venture on its own and is not to be financially guaranteed by its parent." 791 F.2d at 1006.

In the instant case, the Commission followed precisely the reasoning of *RLEA v. ICC* and *RLEA v. U.S.*, and treated Itel and FRVR as separate entities based on its assessment of FRVR's independence. *See* Acquisition Decision at 7-8. In its factual analysis, moreover, the Commission adhered to clear precedent: Like Rochester and Southern in *RLEA v. ICC*, FRVR would own and operate the acquired line under its own name, publish its own tariffs, have its own employees, management, and equipment, and assume sole responsibility for its own operating liabilities. *Id.* at 4, 7-8. Thus, on examining the indicia of FRVR's independence, the Commission reasonably concluded that FRVR was financially and operationally independent of its parent and a non-carrier. *See* Acquisition Decision at 8.

Petitioners, however, argue that Itel's guarantee of a portion of the acquisition debt—a condition admittedly not present in *RLEA v. ICC*—demonstrates that FRVR

is not sufficiently independent of its parent. We agree with the ICC that this guarantee alone need not negate FRVR's financial independence. Although, in *RLEA v. ICC*, we did not specifically adopt the distinction made in *RLEA v. U.S.* between a financial guarantee undertaken by the parent in connection with the initial acquisition financing of its subsidiary and a financial guarantee of the subsidiary's operations, *see* 791 F.2d at 1006, that distinction is reasonable and properly applied in this case. A newly organized subsidiary will be endowed either with assets with which to commence business or with the financial means to acquire them. It makes little difference whether the initial financing takes the form of cash or a debt guarantee to cover the purchase of capital assets. We thus find it perfectly reasonable for the Commission to conclude that FRVR is financially independent of its parent because "Itel [has] assum[ed] none of the risks in the operation of the line." Acquisition Decision at 8.

Petitioners nevertheless challenge the Commission's test of independence by referring us to several recent ICC decisions which, they say, undermine the Commission's reasoning in the instant case by using a different standard for determining whether a subsidiary is a non-carrier. *See, e.g., Delaware and Hudson Ry. Co.—Lease and Trackage Rights Exemption—Springfield Terminal Ry. Co.*, Finance Docket No. 30965 (I.C.C. Oct. 23, 1989); *Rio Grande Indus., Inc.—Purchase and Related Trackage Rights—Soo Line R.R. Line Between Kansas City, MO and Chicago, IL*, Finance Docket No. 31505 (I.C.C. Nov. 13, 1989). Whatever the merits of those decisions, they have no bearing on our disposition of the petition for review of the Acquisition Decision because that decision was delivered before the ones cited by petitioners. It is our task to determine whether that case was properly decided on the basis of the policies and precedents relied on by the agency at the time of its decision. *See, e.g., Reservation Tele. Co-op. v. FCC*, 826 F.2d 1129, 1134 (D.C. Cir. 1987);

Population Institute v. McPherson, 797 F.2d 1062, 1092 (D.C. Cir. 1986).

The other factor relied on by the ICC in determining FRVR's status was whether "FRVR was created *exclusively* for the purpose of evading the labor protection requirements of section 11347." Acquisition Decision at 6 (emphasis added). Petitioners urge that the formalities of corporate structure should have been disregarded because a substantial purpose of FRVR's creation was to evade the imposition of labor protection.

As evidence of such a purpose, petitioners point to certain provisions of the purchase agreement between FRVR and CNW that stipulate, first, that consummation of the transaction is conditioned on its exemption from ICC regulation under section 10901; second, that FRVR warrants that it will qualify as a non-carrier within the meaning of section 10901, "it being understood that one of the factors inducing [CNW] to enter into this Agreement is the foregoing representation"; and third, that the closing of the transaction is subject to the condition that "no administrative or judicial order or decision shall contain or impose on [FRVR] any conditions or provisions for labor . . . protection . . . ." Petitioners maintain that these provisions indicate that the transaction was deliberately structured to avoid employee protection.

In its decision, the ICC responded to this argument by observing, first, that "the existence of the Agreement's labor provisions is not, by itself, dispositive of the issue of whether FRVR was created exclusively to evade labor protection." Acquisition Decision at 6. It then referred to a similar purchase agreement in another case in which the Commission had concluded that such provisions served the legitimate business purposes of "preserv[ing] contractual freedom should the economics of an agreement be altered by regulatory action" and "establish[ing] the compensation the seller is willing to receive and the amount

the buyer is willing to pay." *Id.* at 7. The Commission found that in the instant case the labor provisions served legitimate objectives and that the RLEA had "submitted nothing of record" to show that the avoidance of labor liabilities was "the exclusive reason for the creation of FRVR." *Id.*

At the same time, the Commission declared that "the evidence suggests that FRVR was created for a number of reasons." *Id.* For instance, the Commission noted that Itel Rail and CNW believed that as a local short-line carrier, FRVR would be able to forestall the traffic erosion that CNW had been experiencing on the Duck Creek South lines and otherwise to compete successfully with motor and other carriers in the area. This conformed with the Commission's own experience, which indicated that small regional carriers were able to operate marginal lines more effectively than larger carriers because of their local orientation and dependence on local traffic for survival. *Id.* The ICC also observed that FRVR's creation resulted from the desire to insulate Itel and Itel Rail from the risks assumed by their subsidiary's new venture beyond the amount advanced as initial capital in the form of cash and a loan guarantee. *Id.*

There is evidence in the record to support the ICC's conclusion that these were in fact valid reasons for FRVR's creation. In the notice filed by FRVR and CNW for an exemption from section 10901, the two companies represented that

> FRVR was formed as a separate subsidiary . . . because this structure . . . will minimize the risks to Itel Rail of this new regional rail operation. In addition, this structure will make it possible to consummate the transaction and commence operations more quickly than any other available alternative. Itel Rail and FRVR have determined that timely commencement of service is absolutely essential to FRVR's abil-

> ity to compete with other rail and motor carriers in the area. In particular, FRVR will face substantial competition from Wisconsin Central Ltd., which has been actively soliciting commitments from shippers. This structure offers FRVR the greatest prospect of being able to commence operations quickly, a vital element of its strategy to be an able and effective competitor in the region.

Notice of Exemption filed Sept. 28, 1988, at 4-5. These assertions are supported by a verified statement of Stephen P. Selby, President of FRVR, who confirmed the above and stated that "[w]e recognize that the major factor which makes regional railroad operations a success is their ability to be customer responsive quickly and at top levels." Verified Statement of Stephen P. Selby dated Dec. 22, 1987, at 2, 8. *See also* Verified Statement of L. F. Fox, Assistant Vice President of CNW, at 5 ("Our objective now is to identify lines which, while characterized by conditions that preclude successful operations by [CNW] . . ., nevertheless can be operated profitably and efficiently by a new regional carrier.").

Based on the above, we are satisfied that the Commission reasonably concluded that FRVR was organized for substantial business reasons unrelated to the employee protection liabilities that would have been incurred had the purchase been made by an operating rail subsidiary. We are reluctant, however, to endorse the Commission's formulation that in order to be considered an alter ego of its parent, a subsidiary must have been created for the exclusive purpose of evading the employee protection provisions of section 11343. We prefer to defer that determination until such time as we are presented with a case where the justifications for the formation of a non-carrier subsidiary are less substantial, and the reasonableness of the Commission's rule can be put to a more demanding test.

In the instant case, therefore, we simply conclude that as FRVR met the test of independence and was formed for reasons that are both legitimate and substantial, the ICC could reasonably determine that it was a non-carrier for purposes of section 10901.

III. Conclusion

We conclude that the Commission's interpretations of sections 10901 and 11343 are reasonable and consistent with our precedent, and that its application of the law to the facts of these cases supports its findings that CNW was not involved in the control transaction and that FRVR is an independent entity formed for legitimate business purposes, and therefore a non-carrier. Accordingly, the Commission properly declined to impose labor protective conditions for the benefit of CNW's employees. The petitions for review are

Denied.

Nov. 20, 1990

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
Washington, D.C. 20001-2866

CONSTANCE L. DUPRE
Clerk

GENERAL INFORMATION
(202) 535-3300

November 16, 1990

General Counsel
Interstate Commerce Commission
12th and Constitution Avenue, NW
Washington, DC 20423

Re: 89-1183

Railway Labor Executives' Assoc. v. ICC & USA

Dear Sir/Madam:

Pursuant to the provisions of Rule 41(a) of the Federal Rules of Appellate Procedure transmitted herewith, in lieu of a formal mandate, is a copy of this Court's opinion and a certified copy of the judgment, both filed on September 14, 1990.

Kindly acknowledge receipt on the enclosed extra copy of this letter.

For the Court:

CONSTANCE L. DUPRE
Clerk

By: /s/ Elizabeth Brown
Deputy Clerk

Enclosure
cc: All counsel (letter and judgment) Counsel need not acknowledge receipt.

APPENDIX B

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 32106

ITEL RAIL CORPORATION and ITEL CORPORATION—
CONTINUANCE IN CONTROL EXEMPTION—
FRVR CORPORATION

Decided: September 6, 1988
[Service Date Sep. 12, 1988]

In a decision served February 5, 1988, we granted Itel Rail Corporation (Itel Rail) and, in turn, Itel Corporation (Itel), an exemption under 49 U.S.C. 10505 to continue in control of FRVR Corporation (FRVR), a noncarrier, upon FRVR's acquisition: (1) of the Chicago and North Western Transportation Company's (CNW) "Duck Creek South" lines between Green Bay and Milwaukee, WI; and (2) of incidental trackage rights over CNW's lines between Granville, WI, and CNW's Butler Yard in Milwaukee.[1] We imposed the standard labor pro-

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[1] On December 23, 1987, in Finance Docket No. 31205, *FRVR Corp.—Acq. and Oper. Exempt.—Chicago and N.W. Trans. Co.*, FRVR and CNW filed a notice of exemption under 49 CFR 1150.31 to acquire these lines and incidental trackage rights. A caption summary of the notice was published in the *Federal Register* on January 11, 1988 (53 F.R. 647).

On March 4, 1988, FRVR and CNW filed a supplement to their notice of exemption stating that as part of the transaction CNW will also retain incidental, overhead trackage rights between Duck

tective conditions for control transactions. *See New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 670 (1979).

RLEA alternatively seeks clarification of these conditions or reconsideration of our decision. Michigan Wisconsin Transportation Company, Inc., (MWT) also seeks

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Creek (milepost 4.00) and Green Bay (milepost 0.00) for the exclusive purpose of interchanging traffic at CNW's North Green Bay Yard, which is being acquired by FRVR. The supplement reflected operating considerations that were previously agreed to but inadvertently overlooked when the notice of exemption was originally filed. It was served and published in the *Federal Register* on March 18, 1988 (53 F.R. 8986).

FRVR and CNW included in their notice of exemption a request that the Commission clarify its jurisdiction over labor issues arising out of the formation of this and other shortline railroads. By decision served January 29, 1988, the Commission responded affirmatively, finding that, to the extent necessary, the Railway Labor Act (45 U.S.C. 151) is preempted by the Interstate Commerce Act (ICA) to permit parties to consummate transactions previously authorized or exempted by the Commission under 49 U.S.C. 10901 of the ICA. The Railway Labor Executives' Association (RLEA) has sought judicial review of the January 29th decision. *Railway Labor Executives Ass'n* v. *ICC*, No. 88-1280 (8th Cir., filed February 9, 1988). Subsequently, RLEA petitioned for a cease and desist order to delay consummation of the acquisition transaction until 30 days after completion of judicial review. This was treated as a petition to stay consummation of the sale of the Duck Creek South lines to FRVR pending completion of judicial review, and it was denied in a decision served March 11, 1988.

Michigan-Wisconsin Transportation Company, Inc. (MWT), petitioned for stay and revocation of the notice of exemption in Finance Docket No. 31205 and the Wisconsin Department of Transportation petitioned for a procedural schedule responsive to the FRVR-CNW clarification request and certain other procedural action. The requests for stay and procedural action were denied in a decision served January 15, 1988. The decision stated that MWT's revocation request would be considered in a subsequent decision in Finance Docket No. 31205. Thereafter, RLEA petitioned for revocation of the exemption and later filed a supplement. This petition will also be considered in the subsequent decision ruling on the merits of the revocation requests in Finance Docket No. 31205.

reconsideration. Itel Rail and Itel (collectively Itel) replied to both petitions. CNW seeks leave to intervene, and it replied to RLEA's petition and joined in Itel's reply to MWT's petition. CNW's request for leave to intervene is unopposed and will be granted. CNW is concerned with the possible imposition of labor protection for the benefit of any CNW employees adversely affected by the transaction. Because CNW, as the selling carrier, would be affected by the disposition of these labor requests, its intervention is appropriate and will not result in undue delay or broadening of the issues.

DISCUSSION AND CONCLUSIONS

1. *RLEA's Petition.* RLEA contends that clarification of the labor protective conditions imposed in this control transaction is necessary because the conditions do not specify which employees are covered. Asserting that the control and acquisition transactions are inextricably linked, RLEA argues that the labor protecitons mandated under 49 U.S.C. 11347 for control transactions governed by 49 U.S.C. 11343 should also apply to any CNW employee adversely affected by the related section 10901 acquisition. It states that CNW employees will be adversely affected because CNW will no longer operate over the lines to be acquired by FRVR. If this was not our intention, RLEA requests reopening and reconsideration of the February 5th decision for the purpose of extending labor protection to CNW employees.

In reply, Itel and CNW contend that RLEA's petition constitutes a collateral attack on our decision in *Class Exempt. for the Acq. and Oper. of R. Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1986), *aff'd sub nom. Illinois Commerce Comm'n* v. *ICC*, 817 F.2d 145 (D.C. Cir. 1987). There we stated that labor protection would be imposed in section 10901 acquisition transactions only where exceptional circumstances are shown. CNW notes that exceptional circumstances have not even been alleged

by RLEA and that, even if they were, they would be relevant only to the acquisition and not the control transaction.

Itel and CNW argue that there is nothing of record to suggest that these transactions differ from others so as to merit labor protection for the benefit of CNW employees. They emphasize that the control and acquisition transactions are completely different, involving different parties and issues, and that they are governed by different statutory provisions. Because CNW is not a party applicant to, and has no interest in, the control transaction, Itel and CNW argue that the labor protection imposed there cannot extend to CNW.

RLEA cites a number of decisions to support the imposition of labor protection on the selling carrier when the acquisition and control transactions are inseparable.[2] In response, Itel and CNW contend that these decisions are not pertinent, that RLEA has misinterpreted them, and that for the most part they involve situations where the carrier that was the subject of the labor protection request was also a party to the transaction in which it was imposed.

It was not and is not our intention to impose labor protection on CNW in this control proceeding. Section 11347 requires the imposition of labor protection only for employees adversely affected by the section 11343 control transaction. The control transaction directly affects only employees of carriers in the Itel system. CNW was not a party to the control transaction and its employees are not directly affected by it. The fact that CNW was the vendor in the acquisition transaction provides no basis

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[2] *Texas & Pac. Ry. Co. Oper.*, 247 I.C.C. 285 (1941); *Gulf, Mobile & Ohio R. Co.—Aband.*, 282 I.C.C. 311 (1952); *Louisiana & Arkansas Ry. Co.—Aband.*, 290 I.C.C. 434 (1954); *Seaboard Air Line R. Co.—Trackage Rights*, 312 I.C.C. 797 (1962); and *Soo Line R. Co.* v. *United States*, 280 F. Supp. 907 (1968) (*Soo*).

for granting the relief sought here by RLEA. Nor do the issues in this control proceeding concern CNW. They differ substantially from the issues in the acquisition proceeding and are governed by different statutory provisions.

We agree with Itel and CNW that, with the possible exception of the decision in the *Soo* case, *supra*, note 2, the decisions RLEA relies on to support the imposition of labor protection on CNW in this control proceeding are distinguishable. These decisions for the most part concern the imposition of labor protection on a carrier directly involved in a transaction when that carrier's employees were affected directly and not through another transaction for which separate statutory approval was required. Here, CNW employees were unaffected and CNW was not an applicant with respect to this control transaction. Accordingly. the imposition of labor protection on CNW under these circumstances would be inappropriate at best.

We have consistently rejected the argument that employee protection should be extended to employees of nonapplicant carriers. *See Burlington Northern, Inc.—Control & Merger—St. L.*, 360 I.C.C. 784, 948-50 (1980); *Guilford Transp. Industries, Inc.—Control—B&M Corp.*, 366 L.C.C. 292, 344 (1982); and *Milwaukee Reorganization—Acq. by GTC*, 2 I.C.C.2d 161, 221 (1984).

Even assuming the *Soo* decision lends support to RLEA's position, the reasoning employed there was specifically rejected by the United States Court of Appeals for the Sixth Circuit in *Crounse Corp.* v. *ICC*, 781 F.2d 1176, 1193 (6th Cir. 1986). The Court of Appeals found that this Commission's reasoning in *Soo* failed to give any meaning to the word "affected" in section 11347's description of those employees entitled to labor protection. The Court of Appeals also stated that ". . . every court of appeals that has considered the question has concluded that section 11347 does not apply to employees

not directly involved in the transaction." *Id.* at 1192. Indeed, the judge who wrote the *Soo* decision has since acknowledged that 11347 generally does not cover employees of other railroads which might be affected by the merger. *Cosby* v. *ICC*, 741 F.2d 1077, 1079 n.2 (8th Cir. 1984), cert. denied, 105 S. Ct. 2344 (1985).

The issue of labor protection for CNW employees is relevant solely to the acquisition transaction. It is only this transaction—the acquisition of CNW's Duck Creek South lines by FRVR—that even possibly could have a direct and allegedly adverse effect on CNW employees. The control transaction and any adverse effect that transaction may have on employees relates only to Itel's employees.

Our distinction between the acquisition and control transactions does not deny RLEA an opportunity to justify in the acquisition proceeding the imposition of labor protective conditions on CNW employees. In Finance Docket No. 31205, RLEA argues that the acquisition exemption should be reopened and revoked to the extent necessary to impose protective conditions because FRVR is merely an alter ego of Itel created solely to evade the labor protective requirements of section 11347. That is the appropriate proceeding to make the argument advanced here. In a decision served May 27, 1988, RLEA was granted discovery to permit it to obtain the information it maintains will prove these allegations.[3]

A decision on the merits of the petitions for revocation of the acquisition exemption will be made following the receipt of all pleadings relating to the reconsideration and/or revocation. Our decision on whether to reopen and revoke the exemption in part for the purpose of imposing labor protection on CNW will be based on whether RLEA

[3] Midtec Paper Corporation, a group of shipper organizations, and MWT were also authorized discovery in connection with the acquisition exemption in a decision served March 18, 1988.

has satisfied its burden of showing exceptional circumstances, as required by *Exemption, supra.* As stated in our January 29th decision in the acquisition proceeding, we will consider as exceptional circumstances a showing that: (1) there was misuse of the Commission's rules or precedent; (2) existing contracts subjected line sales to procedural or substantive protection; or (3) the injury to labor is unique and disproportionate to the gains achieved for the local transport system and that compensation is feasible without causing termination of the transaction or substantially undoing the prospective benefits of the Commission's existing policy for other communities and locales.

Having found that the acquisition transaction is the appropriate place to consider and rule on RLEA's labor protection request and that the control transaction is inappropriate for that purpose, we must deny RLEA's alternative request to reopen and reconsider this control proceeding.

2. *MWT's petition.* Itel Rail is a subsidiary of Itel. It directly or indirectly controls several motor carriers and five Class III railroads including the Green Bay & Western Railroad Company (GBW). The GBW runs east-west. It will connect with FRVR at Green Bay, and this connection will give it access to CNW at Milwaukee. MWT operates a rail ferry across Lake Michigan between Kewaunee, WI, and Ludington, MI. Its only connection in Wisconsin is with GBW at Kewaunee. MWT contends that it relies exclusively on GBW for interchanging the traffic that is integral to its existence. If Itel Rail is permitted to exercise common control over both GBW and FRVR, MWT fears that GBW traffic will be diverted from its cross-lake routing to FRVR's Chicago gateway routing via Green Bay and Milwaukee.

MWT contends that regulation is necessary to carry out the goals of the rail transportation, specifically those goals directed at: (1) allowing competition and the de-

mand for services to establish reasonable rail rates [49 U.S.C. 10101a(1)]; (2) ensuring the development and continuation of a sound transportation system with effective competition among rail carriers and with other modes [49 U.S.C. 10101a(4)]; (3) fostering sound economic conditions in transportation between rail carriers and other modes [49 U.S.C. 10101a(5)]; and (4) prohibiting predatory pricing and practices to avoid undue concentrations of market power and unlawful discrimination [49 U.S.C. 10101a(13)]. MWT raised similar arguments in opposition to Itel's original petition to exempt from regulation Itel's continuance in control of FRVR. We disagreed with MWT's contentions, finding instead that continuation of a sound rail system would not be affected by the continuance in control. Essentially, we found that MWT had not shown that the proposed common control was likely to alter materially the transportation operations and services currently provided by the affected carriers. MWT contends that we failed to give adequate consideration to its arguments, and it asserts that we now, for the first time, have an opportunity thoroughly to consider the anticompetitive issues it raises.

MWT also challenges our findings with respect to its traffic diversion argument. We had discounted GBW's ability to control the routing of traffic moving over its line because we found that shippers ordinarily select their routings and that there was nothing to indicate that they would not have that right here. While acknowledging that shippers generally have this right, MWT argues that routing selections are heavily influenced by the originating and/or terminating carrier and by the carrier supplying the car or cars. MWT asserts that it has no influence on the routing of GBW traffic because it is a bridge carrier and does not supply cars. Aside from having no influence over traffic routings, it assertedly would be unable to compete for GBW traffic if, as a result of the common control, GBW and FRVR were

to undercut the rates applicable to MWT's cross-lake routing.

MWT asserts that the acquisition and control transactions were designed to create a north-south system extending via FRVR between Green Bay and Milwaukee to Chicago with GBW and FRVR feeding traffic to each other. Otherwise, it contends that there would have been no reason for Itel to acquire a line connecting with GBW at Green Bay. In this regard, it also observes that Itel reassigned GBW's former President and Vice President-Marketing and Sales to FRVR and contends that this was done intentionally to ensure that GBW and FRVR are run as a single system.

MWT also requests that we reconsider our refusal to impose the alternative conditions offered by it to negate the possible adverse effects of the transaction on its cross-lake ferry service.[4] We declined to impose those conditions finding that the cost burdens they would impose on GBW and FRVR would ultimately be borne by shippers in the form of higher rates. We also found the conditions generally protective in nature and that, as such, they are anticompetitive and contrary to the public interest. *Traffic Protective Conditions*, 366 I.C.C. 112 (1982). We stated that, if in the future MWT believes it is being excluded from GBW traffic as a result of unlawful action by GBW and/or FRVR, it may file a complaint for appropriate relief.

MWT requests that we reconsider these findings and impose the conditions if we affirm our decision granting the exemption. MWT states that the conditions are merely

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[4] These conditions would require: (1) a service agreement by Itel to maintain Kewaunee as a competitive gateway; (2) a car hauling agreement between Itel and MWT at a specified compensation of $1.75 per loaded mile with a $100 minimum per car; (3) an option for 10 years to allow MWT to acquire trackage rights over the lines of GWB and FRVR; and (4) an option and right of first refusal for MWT to purchase GBW's Kewaunee ferry slips.

designed to preserve its right to exist and that shippers would gain from the preservation of competitive options. It argues that the complaint process is an inadequate remedy because it would transfer the burden of proof to MWT. Moreover, it contends that it is operating at a loss and as a consequence fears that it would not be financially able to prosecute a complaint to completion.

Finally, MWT disputes our limited scope finding. It contends that GBW's traffic moves throughout the country and affects many more than the three shippers now using both the GBW and FRVR. It argues that all shippers on both sides of Lake Michigan have an interest in maintaining MWT as a competitive alternative to the Chicago routing. In this regard, it also argues that regulation is necessary to prevent a potentially serious abuse of market power through loss of its cross-lake ferry service.

In response, Itel notes that, under 49 U.S.C. 10327(g)(1) and the corresponding regulations in 49 CFR 1115.3, a proceeding may only be reopened based upon a showing of new evidence, changed circumstances, or material error. Itel states that MWT made no attempt to offer new evidence or show changed circumstances. It characterizes MWT's petition as based solely on bare allegations of material error and vague, unsupported opinions of how persons may act under assumed circumstances. Itel argues that all of MWT's arguments were previously raised and adequately considered.

Itel further states that MWT's fears of traffic diversion are unfounded. Assertedly, the acquisition was premised on FRVR's moving approximately 80,000 carloads annually. In comparison, GBW interchanged only 3,800 carloads with MWT in 1987. Accordingly, Itel maintains that FRVR's success or failure in no way depends on this small amount of GBW traffic. In Itel's view, the diversion of this traffic was not intended and was not one of the motivations leading to the acquisition.

To the contrary, Itel asserts that the diversion of GBW traffic to FRVR would be illogical because GBW's revenue divisions would be reduced while the operating costs over the longer GBW/FRVR route would be increased. To further illustrate the illogical nature of the diversion argument, Itel refers to the fact CSX Transportation, Inc. (CSX), MWT's sole eastern connection, already has the capacity to route traffic around Lake Michigan, but still uses MWT's cross-lake ferry service.

In support of our limited scope finding, Itel notes that GBW is a Class III railroad operating over 250 miles entirely within the State of Wisconsin and that FRVR would be a Class II railroad operating over 208 miles of track in the same State. Without disputing that GBW traffic may move throughout the country, Itel emphasizes the local nature of GBW's service by observing that GBW either originates or terminates more than 90 percent of the traffic moving over its line. Additionally, it contends that whatever potential there is for diverting GBW traffic from MWT does not detract from the former limited scope finding. Responding to MWT's contention that regulation is necessary to prevent an abuse of market power, Itel notes that this provision of section 10505 is designed to protect shippers, rather than carriers, and that no shipper has raised the issue of possible market abuse.

We agree with Itel that MWT's concerns are conjectural and unsupported. Essentially, they are the same arguments we considered in our February 5th decision. While MWT has elaborated on them somewhat, it offers nothing to warrant a change in the conclusions we made in that decision.

The primary basis for MWT's petition for reconsideration and its alternative request for imposition of traffic conditions is its contention that Itel's common control of GBW and FRVR will lead to the diversion of GBW traffic from MWT to FRVR. It argues that, if GBW's traffic is diverted, MWT will fail, and an alternative competitive

routing would be lost in violation of the pro-competitive thrust of the rail transportation policy and the abuse of market power criterion of section 10505.

Contrary to its contention, we had adequate time to consider this issue when we granted Itel's control exemption without conditions. In any event, as already noted, MWT has not submitted any additional support for its traffic diversion argument. (The burden of proof here is the same were MWT to file a separate complaint.) Itel, on the other hand, indicates that GBW/MWT traffic is relatively small and would constitute less than 5 percent of FRVR's projected traffic volume. Without minimizing the importance of this traffic to MWT, Itel argues persuasively that it has no reason to divert it to FRVR. On the contrary, there appears to be merit to its contention that diversion is not in GBW's or Itel's best financial interest because GBW's revenues would decline in connection with the longer movement and the addition of another non-Itel affiliated railroad to the routing. Because of the higher costs and reduced divisions associated with diversion, MWT's fears concerning non-competitive reduced rates via a GBW-FRVR routing appear to be groundless.

MWT's contention that Itel's reassignment of the two GBW officers to FRVR is proof that the two Itel subsidiaries will be run as a single system and that GBW traffic will be routed over FRVR to the maximum extent possible is entirely conjectural. It simply does not carry much weight in view of Itel's evidence indicating that it would be disadvantageous for GBW and FRVR to divert this traffic. Similarly, MWT's argument that it lacks the ability to influence shipper routing because it neither originates nor terminates traffic and provides no cars must be discounted in view of Itel's diversion evidence with respect to CSX. MWT's lack of influence over traffic routing presently exists with respect to CSX traffic and, as Itel notes, MWT has continued to participate in CSX's traffic. There is nothing in the record to suggest that diversion

would commence following the startup of operations by FRVR. Accordingly, we affirm our finding that approval of this control exemption is consistent with the rail transportation policy in that it will not materially change the transportation operations or services currently provided by the affected carriers.

Nor can we accept MWT's contention that this transaction exceeds the limited scope criteria of section 10505. Itel properly noted that more than 90 percent of this traffic originates or terminates on GBW lines. GBW is a small Class III railroad operating over only approximately 250 miles of track in a single State. FRVR hopes to qualify as a Class II carrier and will operate over only about 208 miles of track entirely within the same state. Having already concluded that no material change in transportation operations or services will result, we cannot characterize the transaction as being anything more than limited in scope.

We also reaffirm our prior finding that there is little or no potential for an abuse of market power. MWT's concerns in this regard are based on its fears of GBW traffic being diverted, thereby resulting in the loss of its cross-lake ferry service. However, as seen, there is no basis in the record for concluding that MWT will suffer a loss of GBW traffic or go out of business. Specifically, we can find no evidence to suggest that the success of these acquisition and control transactions are in any way dependent on diverting GBW traffic from MWT or that Itel would have any incentive to use routing pressure or below cost pricing to divert traffic from MWT. Shippers or other members of the public should not be adversely affected. As indicated above, numerous shippers generally support the transaction. There is no indication that any shipper or other member of the public is concerned with the potential for an abuse of market power. Not one of the three shippers who currently route over both the GBW and MWT have expressed any concern about the common

control. Moreover, we noted in our February 5th decision, that the two largest shippers support the transaction. Accordingly, we have no reason to believe that our exemption of this control transaction is likely to result in an abuse of market power.

Having found no basis for MWT's traffic diversion concerns, we must reaffirm our prior refusal to impose the alternative traffic conditions requested by MWT. As stated in our February 5th decision, we generally have found protective conditions anticompetitive and contrary to the public interest. *See Traffic Protective Conditions, supra.* While they may protect competitors, they do not protect competition. MWT has not established that these conditions are necessary or in the public interest here.

Finally, we must reject MWT's argument that the complaint process is inadequate to protect its interest. As noted, the burden of proof would be no different than it is here. We reiterate that the complaint process is available. In addition, MWT may at any time seek revocation of this exemption if on reopening it can show that its fears have materialized. All we find here is that it has not done so on this record. We will give expedited consideration to any request to reopen this proceeding based on changed facts or circumstances.

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. The motion of the Chicago and North Western Transportation Company for leave to intervene is granted.

2. The Railway Labor Executives' Association's request for clarification is granted as provided above. Its alternative request for reconsideration and the petition for reconsideration filed by Michigan-Wisconsin Transportation Company, Inc., are denied.

3. This decision is effective on the service date.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Simmons, Lamboley, and Phillips. Commissioner Lamboley commented with a separate expression.

NORETA R. MCGEE
Secretary

[SEAL]

Commissioner LAMBOLEY, commenting:

While I do not agree with the majority's presumptive and systematic refusal to impose labor protective conditions in 49 U.S.C. 10901 exemption proceedings,[1] I do agree that the proper forum to consider the imposition of labor conditions for affected CNW employees is Finance Docket No. 31205, rather than the instant control exemption proceeding. It is within the context of that acquisition proceeding RLEA will have the appropriate opportunity to make its argument.

As to the MWT petition, although no new probative evidence was submitted to merit imposition of protective conditions in favor of MWT, I reaffirm my concern about competition and potential market abuse expressed earlier in this proceeding[2] and will wait to measure the intentions and conduct of the parties in implementing this transaction.

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[1] Please see my separate expression in *Class Exemption for Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C. 2d 810 (1985); 49 C.F.R. 1150.31 *et seq.*; modified on reopening by decision served February 29, 1988.

[2] See my separate expression Finance Docket No. 31206, *ITEL Rail Corporation and ITEL Corporation—Continuance in Control Exemption—FRVR Corporation*, served February 5, 1988.

APPENDIX C

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 31205

FRVR CORPORATION—ACQUISITION AND OPERATION EXEMPTION—CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY

Decided: February 21, 1989
[Service Date Feb. 28, 1989]

FRVR Corporation (FRVR) and the Chicago and North Western Transportation Company (CNW) filed a notice of exemption on December 23, 1987, under 49 CFR 1150.31 for FRVR, a noncarrier, to acquire and operate CNW's "Duck Creek South" lines between Green Bay and Milwaukee, WI. FRVR was also to acquire incidental trackage rights over CNW's lines between Granville, WI, and CNW's Butler Yard in Milwaukee for the purpose of interchanging traffic.[1] The exemption became effective on

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[1] In a related proceeding, Finance Docket No. 31206, *Itel Rail Corp. and Itel Corp.—Cont. in Control Exempt.—FRVR Corp.* (not printed), served February 5, 1988, we granted Itel Rail Corporation (Itel Rail) and, in turn, Itel Corporation (Itel), its corporate parent, an exemption under 49 U.S.C. 10505 to continue in control of FRVR upon FRVR's consummation of the acquisition, subject to the standard labor protective conditions for control transactions set forth in *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979). By decision served September 12, 1988, we clarified these conditions in response to a request by the Railway Labor

December 30, 1987, and a caption summary of it was simultaneously served and published in the *Federal Register* on January 11, 1988 (53 F.R. 647).[2]

BACKGROUND

Railway Labor Executives' Association (RLEA) petitioned for a cease and desist order to delay consummation of the acquisition until 30 days after completition of judicial review. This was treated as a petition to stay and was denied in a decision served March 11, 1988 (stay decision). Subsequently, MWT petitioned for stay and revocation of the exemption, and the Wisconsin Department of Transportation (WisDot) petitioned for a procedural schedule responsive to a FRVR-CNW clarification request (*see* note 2) and certain other procedural action.

Executives' Association (RLEA) and further, we found that labor protection should not be imposed on CNW, the selling carrier, and we denied RLEA's alternative request for reconsideration and a petition for reconsideration filed by Michigan-Wisconsin Transportation Company, Inc. (MWT).

[2] On March 4, 1988, FRVR and CNW filed a supplement to their notice of exemption indicating that as part of the transaction CNW would also retain incidental, overhead trackage rights between Duck Creek (milepost 4.00) and Green Bay (milepost 0.00) for the exclusive purpose of interchanging traffic at CNW's North Green Bay Yard. The trackage rights arrangement was previously agreed to but inadvertently overlooked when the notice of exemption was originally filed. It was served and published in the *Federal Register* on March 18, 1988 (53 F.R. 8986).

FRVR and CNW had included in their notice of exemption a request that the Commission clarify its jurisdiction over labor issues arising out of the formation of this and other shortline railroads. By decision served January 29, 1988, the Commission responded affirmatively, finding that, to the extent necessary, the Railway Labor Act (45 U.S.C. 151, *et seq.*) is preempted by the Interstate Commerce Act (ICA) to permit parties to consummate transactions previously authorized or exempted by the Commission under 49 U.S.C. 10901 of the ICA. That decision was affirmed in *Railway Labor Executives' Ass'n* v. *ICC*, 861 F.2d 1082 (8th Cir. 1988); petition for rehearing pending.

These requests were denied in a decision served January 15, 1988. Instead, we stated that MWT's revocation request would be considered in a subsequent decision. Thereafter, RLEA petitioned for revocation of the exemption and later filed a supplemental petition in support of revocation. We stated in our March 11, 1988, stay decision that RLEA's petition would also be considered in the subsequent decision ruling on the merits of MWT's revocation request.

By decision served March 18, 1988, discovery was authorized and, subject to the terms of a protective order, access to the sales agreements underlying the acquisition transaction was given to: Midtec Paper Corporation (Midtec), an affected shipper; Wisconsin-Upper Michigan Rail Users Committee; Wisconsin Paper & Pulp Manufacturers' Association, Inc.; and Wisconsin Association of Manufacturers & Commerce, Inc. (collectively Wisconsin shippers); and MWT. Subsequently, WisDot was given access to the underlying sales agreements subject to compliance with the protective order. Then, by decision served May 27, 1988, RLEA was granted discovery and also permitted access to the underlying sales agreements, subject to compliance with the protective order.[3]

Following completition of discovery, WisDot submitted a letter stating its unequivocal support for the transaction. RLEA filed both a second supplemental statement in support of its revocation request,[4] and a motion to modify the protective order to permit consideration of certain labor-related provisions of the underlying sales agree-

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[3] Although the protective order was expanded to apply to both Finance Docket Nos. 31205 and 31206, in conformity with RLEA's concerns, RLEA's supplemental statement in response to discovery, discussed *infra*, was filed only in Finance Docket No. 31205.

[4] RLEA moved for leave to file this supplemental statement. Leave to file was unnecessary under our discovery procedures. 49 CFR Subpart B-*Discovery*.

ments. Midtec, Wisconsin shippers, and MWT did not engage in discovery.

FRVR and CNW replied separately to MWT's revocation request, and FRVR filed separate replies to RLEA's revocation request[5] and to its first supplemental statement in support of that request. FRVR and CNW filed joint replies to RLEA's second supplemental statement and its motion for modification of the protective order.

DISCUSSION AND CONCLUSIONS

MWT's petition for revocation. MWT operates a rail ferry across Lake Michigan between Kewaunee, WI, and Ludington, MI. Itel Rail directly or indirectly controls several motor carriers and a number of Class III railroads including FRVR and Green Bay & Western Railroad Company (GBW). The GBW runs east-west crossing the entire State of Wisconsin. Through its connection with FRVR at Green Bay, it will have access to CNW at Milwaukee. MWT's only connection in Wisconsin is with GBW at Kewanuee.

Noting that it relies exclusively on GBW for interchanging the cross-lake traffic that is integral to its existence, MWT contends that Itel Rail, as the corporate parent of both FRVR and GBW, will have an incentive to divert GBW traffic from MWT's cross-lake routing to FRVR's Chicago gateway routing via Green Bay and Milwaukee. MWT asserts that, if this occurs, or even if the acquisition results in a less friendly connection between it and GBW, the ferry operation will lose its viability. To preserve its competitive position, MWT requests that the exemption be revoked.

Alternatively MWT requests imposition of certain conditions intended to preserve its competitive status. Spe-

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[5] CNW subscribes to the statements made by FRVR in its reply to RLEA's revocation request.

cifically, MWT requests conditions requiring: (1) GBW to provide car service 5 days a week, with train service not to exceed 18 hours; (2) GBW to enter into a car haulage agreement at a specific compensation per loaded mile and a minimum of $100 per car; (3) GBW and FRVR to grant MWT an option to acquire trackage rights over their lines; and (4) GBW to grant MWT an option, and right of first refusal, to purchase GBW's Kewaunee ferry slips and adjacent rail property. FRVR's and CNW's replies are directed to whether these conditions should be imposed.

MWT raised these same matters in opposition to the exemption petition filed in Finance Docket No. 31206 (the control proceedings), and again in its petition for reconsideration of the decision granting that petition. We considered these matters in that proceeding and, as indicated in note 1, we rejected MWT's arguments on both occasions for the reasons stated in our February 5, 1988, and September 12, 1988, decisions. Specifically, in our February 5th decision, we found unconvincing MWT's stated fears of traffic diversion. We further found that its alternative request for conditions was not shown to be warranted because: (1) the additional burdens such conditions would impose on GBW and FRVR would ultimately be borne by the shipping public; and (2) the conditions are protective in nature and we have found that protective conditions generally are anticompetitive and contrary to the public interest. *See Traffic Protective Conditions*, 366 I.C.C. 112 (1982). We also concluded that, if in the future MWT believes that it is being forced out of participation in GBW traffic as a result of unlawful action by GBW and/or FRVR, it may file a complaint seeking appropriate relief.

In our September 12, 1988, decision we noted that, while MWT had elaborated on its arguments, it offered nothing to warrant a change in our February 5, 1988, decision. We discussed in greater detail the issues raised

by MWT, and affirmed the findings in our February 5, 1988, decision relative to MWT.

MWT has offered nothing new or additional in this proceeding to support its position. Accordingly, with nothing further to consider, we will affirm our findings in the control proceeding relative to MWT and deny MWT's revocation petition here.

RLEA's petition for revocation. Acknowledging that labor protection is discretionary under 49 U.S.C. 10901, RLEA contends that this exemption from section 10901 was inappropriate because FRVR cannot be considered a noncarrier since it has not been shown to be independent of Itel Rail and/or Itel Rail's subsidiaries, particularly GBW. RLEA argues that FRVR is merely an alter ego of Itel Rail. Assertedly, it was created solely to evade the labor protection requirements of 49 U.S.C. 11347. On this basis, RLEA requests that this proceeding be reopened and the acquisition exemption revoked to the extent necessary to impose labor protective conditions for the benefit of CNW and other adversely affected employees. RLEA observes that section 11347 would have been applicable had Itel Rail used GBW, one of its rail carrier subsidiaries, to acquire the lines and that this further supports its evasion argument.

In its first supplemental statement in support of revocation, RLEA submits that FRVR's lack of independence is demonstrated by the fact that FRVR will have no assets of its own and that Itel Rail, in providing an "equity contribution" of $14 million towards the purchase, and by guaranteeing the loan for the $47 million remainder, also to be secured by the property acquired, will guarantee payment of the purchase price of $61 million.

Even if FRVR is found not financially dependent on Itel Rail, RLEA argues that there are sufficient other indicia of a lack of independence to support an alter ego finding. Although FRVR may have its own management,

enter into its own rate contracts and publish its own tariffs, hire its own employees, and conduct its own operations, RLEA asserts that these factors are insignificant when compared with the financial relationship between FRVR and Itel Rail. Alternatively, if FRVR is found to be independent and not to have been formed exclusively to evade the labor protection requirements of section 11347, RLEA contends that these other indicia of independence should be disregarded. It advocates a new test requiring that an acquiring entity, controlled by or related to a carrier, be treated as a carrier if it connects with a related carrier.

In reply, FRVR contends that RLEA has failed to demonstrate that it was created exclusively to evade its labor protection requirements of section 11347 or that it is not sufficiently independent from affiliated carriers. It argues that disregarding FRVR's separate corporate status would ignore the purposes for which FRVR was created: namely, to assure FRVR's financial independence and to minimize the financial risk to Itel Rail of the proposed new regional operation. While acknowledging that Itel Rail will guarantee the purchase loan, FRVR stresses that Itel Rail is not a guarantor of its operations and in fact will be insulated from any financial obligations incurred by FRVR in connection with its operations.

RLEA submits that portions of the Assets Purchase Agreement (Agreement) obtained through discovery demstrate that the transaction was purposely structured to avoid employee protection. Contending that these portions of the Agreement do not require confidentiality, it requests modification of the protective order to permit disclosure and consideration. In reply, FRVR and CNW question the relevancy of these portions of the agreement and argue that the continued confidentiality of the document will not impair our ability to resolve the issues raised by RLEA. FRVR and ITEL Rail contend that the terms of the Agreement relate to confidential aspects of FRVR's costs

and its corporate strategy, and that RLEA has failed to assert, much less prove, that the presentation of its case will be prejudiced by maintaining the Agreement's confidentiality.

RLEA's motion for modification of the protective order will be granted. The portions of the Agreement in question concern labor-related conditions. FRVR and CNW do not specifically assert that they are in any way confidential. Instead they maintain that their disclosure is unnecessary for the proper disposition of this proceeding. We disagree. Because the conditions concern labor and bear directly on the issues raised by RLEA, they are clearly relevant and should be considered. The conditions are incidental terms of the Agreement; they do not contain any proprietary information. Because we will consider and disclose only these labor-related conditions, FRVR's and CNW's concern about disclosure of FRVR's costs and corporate strategy is misplaced.

In its second supplemental statement, RLEA points out that the Agreement's labor-related conditions make consummation of the acquisition contingent upon the following factors: (1) that there be no significant union organization compaign or labor dispute; (2) that FRVR qualify as a noncarrier under section 10901, it being understood that its ability to do so is one of the factors inducing CNW to enter into the Agreement; and (3) that no labor protective conditions be imposed on FRVR. RLEA argues that these provisions undercut FRVR's position because they allegedly prove that FRVR was created substantially, if not entirely, to evade the imposition of labor protection, and not to isolate Itel Rail and Itel from the operational risks of the transaction or to assure FRVR's independence.

Even if the transaction is found subject to section 10901, and not section 11343, RLEA submits that the exemption should be revoked because the Agreement's labor conditions demonstrate that the transaction is contrary to the Railway Labor Act (RLA), 45 U.S.C. 151, *et seq.*

Specifically, it contends that the conditions unlawfully restrict collective bargaining rights by making the agreement voidable if: (1) there is any labor dispute; (2) there is an event that would threaten or result in increased labor costs; or (3) there is a significant union organization campaign in progress. RLEA argues that this last provision also contravenes the RLA by limiting freedom of association among employees to organize.[6]

In reply, FRVR and CNW state that the issue of FRVR's independence was previously resolved in our March 11, 1988, stay decision. They assert that RLEA's second supplemental statement merely reiterates prior arguments and that the labor-related provisions of the Agreement now being relied upon by RLEA to bolster those arguments provide no additional support for granting the relief sought. FRVR and CNW contend that these provisions simply show that they negotiated the transaction with the legitimate expectation that no labor protective conditions would be imposed and that no labor dispute would ensue. FRVR and CNW assert that there was nothing sinister in structuring the transaction to qualify under the class exemption procedures in section 1150.31. Noting that these exemption procedures were adopted expressly to permit the expeditious acquisition of marginal rail lines by noncarriers, in the expectation that these marginal lines could be revitalized, FRVR and CNW state that the structure of the transaction was entirely consistent with this objective. Notwithstanding that the transaction may have been structured to avoid the imposi-

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[6] In addition to the above labor-related provisions, RLEA objects to a provision in the Agreement requiring CNW employees seeking employment with FRVR to complete and sign a form stating that they will resign from CNW. RLEA argues that this provision unlawfully requires them to relinquish their entitlement to certain collectively bargained rights. In their reply, FRVR and CNW state that FRVR agreed, at RLEA's request, to drop this requirement. Accordingly we need not consider this allegation further here.

tion of labor protective conditions, they contend that FRVR was not created exclusively for this purpose and that RLEA has not demonstrated otherwise.

In response to RLEA's RLA arguments, FRVR and CNW observe that violations of the RLA would require total revocation, not just revocation to the extent necessary to impose labor protection. They state that the labor-related provisions of the Agreement only give FRVR the right to extricate itself from the Agreement if labor-related problems exist, and that this does not contravene any provision of the RLA. FRVR and CNW assert that RLEA's position is substantially undercut by the decision in *Chicago and Northwestern Transportation Co.* v. *RLEA*, 855 F.2d 1277 (7th Cir. 1988), *cert. denied*, —— U.S. ——, Nov. 28, 1988 (No. 88-464) (*CNW*). There the Seventh Circuit determined that this controversy was a "minor" dispute under the RLA and as a consequence subject to arbitration, rather than the collective bargaining procedures of the RLA. FRVR and CNW also note that in our January 29, 1988, decision we determined that the RLA, to the extent here pertinent, was superceded by the Interstate Commerce Act in cases arising out of the sale or other disposition of rail properties pursuant to 49 U.S.C. 10901. This determination was affirmed by the Eighth Circuit in *RLEA* v. *ICC*, 861 F.2d 1082 (8th Cir. 1988).[7]

At the outset, we note that RLEA has made no attempt to show the exceptional circumstances necessary to justify the imposition of labor protective conditions on the CNW, the selling carrier. *Class Exemption—Acq. & Oper. of R. Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1986), *aff'd sub nom. Illinois Commerce Comm'n* v. *ICC*, 817

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[7] *Accord, Burlington Northern R.R.* v. *UTU*, 848 F.2d 856 (8th Cir. 1988). *But see Pittsburgh & Lake Erie R.R. Co.* v. *RLEA*, 845 F.2d 430 (3rd Cir. 1988); *Pet. for cert. granted*, No. 87-1888, 57 U.S.L.W. —— (November 28, 1988).

F.2d 145 (D.C. Cir. 1987) (*Class Exempt.*).[8] Its arguments for revocation rest on two allegations: that FRVR is merely an alter ego of Itel Rail; and that the terms of the purchase agreement contravene the RLA.

Respecting the first allegation, the parties agree that a credible alter ego argument must include either a showing that FRVR was created exclusively for the purpose of evading the labor protection requirements of section 11347 or that FRVR is not a separate entity because it is not sufficiently independent of its parent or affiliated carriers. *See* Finance Docket No. 30779, *Rochester & S. R., Inc., and Genessee & Wyo. Industries, Inc.—Exempt. from 49 U.S.C. 10901, 11301, and 11343* (not printed), served July 18, 1986 (*Rochester*), *aff'd sub nom. Railway Labor Executives' Ass'n* v. *ICC*, 819 F.2d 1172 (D.C. Cir. 1987) (*RLEA II*); and Finance Docket No. 30629, *Staten Island Ry. Corp.—Exempt. from 49 U.S.C. 10901; Delaware Otsego Corp. & Staten Island Ry. Corp.—Exempt from 49 U.S.C. 11301* (not printed), served July 18, 1985 (*Staten Island*). Based on the evidence of record, we conclude that FRVR has not been shown to be merely an alter ego of Itel Rail.

Contrary to RLEA's contentions, the existence of the Agreement's labor provisions is not, by itself, dispositive of the issue of whether FRVR was created exclusively to evade labor protection. A similar issue arose in *Eureka*, *supra* note 8, where the purchase agreement specifically provided either party with the right to terminate the

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[8] Recent cases where we considered and ruled on issues of exceptional circumstances include: Finance Docket No. 30555, *Northwestern Pac. Acq. Corp. & Eureka So. R. Co.—Exempt. from 49 U.S.C. 10901 and 11301* (not printed), served January 8, 1988 (*Eureka*); Finance Docket No. 31089, *Montana Rail Link, Inc.—Exempt. Acq. and Oper—Certain Lines of Burlington N. R. Co.* (not printed), served May 26, 1988; and Finance Docket No. 30457, *San Diego & Imperial Valley R. Co. Inc.—Exempt. From 49 U.S.C. 10901 and 11301* (not printed), served July 27, 1988. *See also* our decision served January 29, 1988, in this proceeding, *supra* at n.2.

transaction if labor protection were imposed in the sale and granted the selling carrier a right of indemnification against the buyer for any financial obligation connected with the imposition of labor conditions. We concluded that, standing by themselves, termination/indemnification provisions constitute a legitimate effort to preserve contractual freedom should the economics of an agreement be altered by regulatory action. We found these negotiated sales terms to serve a legitimate and necessary business purpose by defining in precise economic terms the labor-related liabilities of the parties to a section 10901 transaction. They are an effort to establish the compensation the seller is willing to receive and the amount the buyer is willing to pay. In an arms length transaction we found it reasonable for a potential purchaser to reserve this option in the event that expanded, labor startup costs threaten the viability of the new enterprise. *Id.* slip op. at 7.

RLEA has submitted nothing of record to suggest that the use of these labor provisions in the Agreement at issue here represents anything more than an effort to expand the parties' options with respect to this sale. This is a legitimate business purpose, and by no means has it been shown to be the exclusive reason for the creation of FRVR. To the contrary, the evidence suggests that FRVR was created for a number of reasons. Uppermost among these was to forestall further traffic erosion and abandonments. Clearly, Itel Rail and CNW view FRVR as capable of preserving rail service and otherwise competing successfully with motor carriers in the area. Moreover, our experience demonstrates that smaller, regional shortline carriers like FRVR generally can operate marginal rail lines more effectively than Class I carriers because they are locally oriented and dependent on local traffic for their survival. *See Class Exempt., supra* at 813.

Another primary reason for FRVR's creation was to limit the risks to be assumed by Itel and Itel Rail in con-

nection with the new venture. Itel and Itel Rail were willing to advance the initial capital and otherwise guarantee the remaining acquisition costs; apparently they were not willing to assume the additional risks associated with FRVR's operation. There is nothing of record to suggest that Itel or Itel Rail acted improperly in capping the financial risks they were willing or capable of sustaining.

RLEA also contends that FRVR is not independent of Itel or of any of the carrier's subsidiaries because FRVR lacks the requisite financial independence from the carrier. In RLEA's view FRVR has no assets. FRVR's assets belong to Itel Rail due to the carrier's equity contribution of $14 million dollars and a guarantee of the loan of $47 million dollars to FRVR for the purchase of the Duck Creek South line. Thus, in RLEA's view, Itel stands as a guarantor of FRVR. RLEA also asserts that this financial relationship between parent and subsidiary outweighs any other indicia of independence and supports a finding that FRVR is nothing more than an alter ego of Itel.

RLEA is wrong. Neither the equity contribution or the loan guarantee establishes FRVR as an alter ego of Itel. The case law is clear that where the subsidiary "is financially independent of the parent and is not financially guaranteed by the parent . . . the ICC is not compelled to ignore corporate formalities but may decide each case on its own facts, treating related entities as separate where, in its judgment, the facts demonstrate sufficient indicia of independence." *Railway Labor Executives' Association* v. *ICC*, 819 F.2d 1172, 1173 (D.C. Cir. 1987).

In determining whether a subsidiary is financially independent of its parent, the D.C. Circuit agreed with the formulation posited by the Second Circuit in *Railway Labor Executives' Association* v. *United States*, 791 F.2d 994 (2d Cir. 1986). There the court held as independent a subsidiary whose parent guaranteed only the financial

obligations of the subsidiary to the selling carrier. In all other respects the court found the subsidiary as assuming the risks of operating the rail line as the parent had intended when it established the subsidiary. *Id.* at 1006.

The situation before us now is identical to that in the Second Circuit. Itel has guaranteed FRVR's obligations to the selling carrier, *i.e.*, the purchase price of the line. In all other respects FRVR is financially independent of its parent with Itel assuming none of the risks in the operation of the line. This independence compels the conclusion that FRVR is not an alter ego of Itel. *RLEA* v. *ICC, supra.*

Moreover, FRVR has other indicia of independence. FRVR will have its own employees, management and equipment. It will publish its own tariffs and operate under its own name. In our March 11, 1988 decision we found that these indicia fully supported our determination to classify FRVR as an independent entity and as a noncarrier. RLEA has presented no evidence warranting a contrary decision here.

RLEA requests that we adopt a new test for determining independence in the context of acquisitions under section 10901. It urges that a newly created acquiring entity, controlled by or related to a carrier, be considered a carrier if it will connect with a related carrier.[9] The test advocated by RLEA would bring this transaction under section 11343 and result in the mandatory imposition of labor protection without any consideration of the independence of FRVR or the lack of responsibility of the parent in the operation of the line. RLEA has offered no justification for such a test. We believe that our factual review of the relationship of the seller and buyer,

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[9] A similar request by RLEA is pending in Finance Docket No. 31116, *Buffalo & Pittsburgh R.—Exempt.—Acq. & Oper. of Lines in New York and Pennsylvania.*

coupled with a consideration of the exceptional circumstance test adopted in *Class Exempt.*, *supra*, and refined in *Eureka*, *supra*, and our January 29, 1988, decision in this proceeding, is the appropriate method for balancing the needs of all segments of the public, including rail labor, to foster rail transportation and employment needs against other aspects of the public interest.

Finally, RLEA argues that the labor-related conditions in the Agreement contravene the RLA. RLEA submits that the labor-related provisions of the Agreement are contrary to the public interest because they restrict the collective bargaining right of future FRVR employees. In response to this we note the following: first, we fail to see how these closing conditions, negotiated by and applicable to the acquiring and selling entities, can restrict the collective bargaining rights of future FRVR employees. These provisions merely establish under what conditions the sale will be consummated. *Eureka*, *supra*. As such they are perfectly appropriate.

Moreover, as we found in our January 29th decision, in an acquisition by a noncarrier under section 10901, the RLA is superseded by the ICA. Thus, the RLA has no role to play in the consummation of this transaction. *RLEA* v. *ICC*, *supra*; *Burlington Northern R. R. Co.* v. *United Transportation Union*, 848 F.2d 856, 864 (8th Cir. 1988), *reh'g denied*, —— F.2d —— (September 23, 1988). RLEA has presented no evidence that counsels any other result and we conclude that the relief sought by RLEA must be denied.

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. The motion of RLEA for modification of the protective order entered in this proceeding is granted to the extent described above.

2. The petitions for revocation filed by MWT and RLEA are denied.

3. This decision is effective on its of service date.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Andre, Lamboley, and Phillips. Vice Chairman Simmons dissented with a separate expression. Commissioner Lamboley dissented in part with a separate expression.

NORETA R. MCGEE
Secretary

[SEAL]

VICE CHAIRMAN SIMMONS, dissenting

As I stated in my dissent to the decision in this case served January 29, 1988, I believe the majority is tacitly applying an "exceptional circumstances" test which offers labor little opportunity to prevail on the merits of its arguments. I agree with Commissioner Lamboley that further hearing of RLEA"s contentions is warranted.

Additionally, on reexamination of the concerns of MWT, I am convinced that some protection should be provided to forestall the possibility of anticompetitive behavior by ITEL, FRVR, or GBW. I would impose a condition on the purchase that Itel and GBW maintain the Kewaunee interchange as a competitive gateway with service at a level comparable to that now being provided. FRVR states that it would be disadvantageous for GBW to divert MTW cross-lake traffic at this time. Thus, a condition which maintains the status quo would assuage MTW's fears and would not be a burden on GBW.

COMMISSIONER LAMBOLEY, dissenting in part:

I would grant RLEA's petition to reopen this proceeding and institute an oral hearing as the most appropriate process in which to ascertain the merits of RLEA's contentions. In my view, RLEA has raised serious questions concerning true independence in the relationship of FRVR and Itel,[1], and as such, the availability of the 49 U.S.C. 10901 exemption[2] for non-carriers in these circumstances. Such complex issues are inextricably fact bound, and thus warrant an oral hearing to provide the opportunity to examine evidence and witnesses.

Additionally, this represents another case where it is fairly clear that the essence of the dispute in this transaction involves labor relations, not transportation. My view is well known in these instances.[3] This case joins the growing number of other cases wherein the "exceptional" or "extraordinary" circumstances evidentiary showing has *never* been made to the majority's satisfaction. This is unfortunately consistent with earlier treatment accorded these matters by the majority.[4]

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[1] As well as whether FRVR was created exclusively for the purpose of evading the labor protection requirements of 49 U.S.C. 11347.

[2] Ex Parte No. 392 (Sub-No. 1), *Class Exemption for the Operation of Rail Lines Under 49 U.S.C.* 10901.

[3] See my separate expression in FD No. 30555, *Northwestern Pa. Acq. Corp. & Eureka So. R. Co.—Exempt from 49 U.S.C. 10901 and 11301* (not printed), served July 21, 1988.

[4] See my separate expression in this proceeding, served January 29, 1988.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-1436

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES of AMERICA,
Respondents

BEFORE: Edwards, Silberman, and Williams, Circuit Judges

JUDGMENT

[Filed Oct. 30, 1990]

Upon consideration of the record herein, briefs of the parties, this court's decisions in *Railway Labor Executives' Association et al. v. Interstate Commerce Commission*, No. 88-1793, and *Railway Labor Executives' Association et al. v. Interstate Commerce Commission*, No. 89-1183, D.C. Cir. (Sept. 14, 1990), and of the supplemental submissions in response to the order of April 30, 1990, it is

ORDERED and ADJUDGED, by the Court, that the petition for review herein is denied.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any

timely petition for rehearing. *See* D.C. Cir. R. 15(b)(2).

Per Curiam

FOR THE COURT:

CONSTANCE L. DUPRE
CLERK

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

APPENDIX E

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 31116

BUFFALO & PITTSBURGH RAILROAD, INC.—EXEMPTION—
ACQUISITION AND OPERATION OF LINES IN
NEW YORK AND PENNSYLVANIA

Finance Docket No. 31117

GENESEE & WYOMING INDUSTRIES, INC.,
THE ARTHUR T. WALKER ESTATE CORPORATION
AND DUMAINES AND BUFFALO & PITTSBURGH
RAILROAD, INC.—EXEMPTION CONTROL

Decided: June 20, 1989

[Service Date Jul. 10, 1989]

The Buffalo and Pittsburgh Railroad (the B&P), a newly-created corporate subsidiary of Genesee & Wyoming Industries, Inc. (GWI) and the Arthur T. Walker Estate Corporation (Walker), acquired and has begun to operate a 369-mile railroad line in western New York and Pennsylvania. The B&P acquired the line and the

authority to operate it under our class exemption procedure.[1] B&P's corporate parents, GWI and Walker, also sought and were granted an exemption from our regulation in order jointly to control B&P and also to allow B&P to acquire control of two other CSXT railroads, the Clearfield & Mahoning Railway Company (C&M) and the Allegheny & Western Railway Company (A&W).[2] We imposed conditions to protect any employees adversely affected by the control transaction, as required by 49 U.S.C. 11347. We did not impose labor protective conditions on the acquisition.

Two labor unions, the Railway Labor Executives' Association (RLEA) and the United Transportation Union (UTU),[3] have asked us to revoke the exemptions for both the control and the acquisition or, in the alternative, to impose labor protective conditions on the acquisition and operation of the line, and to impose broader protective conditions in the control transaction. A letter-petition for reconsideraiton of the control exemption in Finance Docket No. 31117 was also filed by Anne Marie Costello, County Legislator for Cattaraugus County, NY (the legislator).

By decision served April 7, 1989, the Chairman authorized discovery in this proceeding.[4] Her decision also

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[1] *See* the notice in Finance Docket No. 31116 published in the *Federal Register* on October 26, 1987. The B&P acquired the line from CSX Transportation, Inc. (CSXT) and its affiliate the Buffalo, Rochester & Pittsburgh Railway Company (BRP).

[2] *See* Finance Docket No. 31117, decision served December 28, 1987. The control transaction also involves Dumaines, a New Hampshire trust which owns Walker, and a number of carrier subsidiaries of Dumaines and Walker, discussed below.

[3] UTU's petition included a request for stay which was denied by decision served October 19, 1988. UTU's second request for stay was denied by decision served February 10, 1988. On July 19, 1988, B&P began operations over the line.

[4] UTU's first request for discovery was denied by decision served February 1, 1988. By decision served July 28, 1988, the Chairman

granted CSXT's petition to intervene. B&P and CSXT filed replies to the petitions to revoke.[5] Following discovery, RLEA submitted supplemental evidence and argument, and B&P and CSXT replied. We will deny the petitions to revoke the exemption. We will not impose any labor protective conditions in the acquisition proceeding, and we will not impose extraordinary employee protective conditions in the control proceeding.[6]

BACKGROUND

B&P is a Delaware corporation formed to acquire and operate CSXT's (and its affiliate, BRP's) 200-mile main line between Buffalo, NY and Eidenau, PA. The transaction also encompasses the acquisition and operation of several branch lines, totalling some 169 miles. About 57,000 cars move over these lines per year, with projected revenues of $27 million. The purchase price was $28.5 million.

GWI and Walker each own 50 percent of the capital stock of B&P. GWI is a holding company that controls, through stock ownership, several railroads including the Genesee & Wyoming Railroad Co. (GWRR), the Dansville and Mount Morris Railroad Co. (DMM), and the

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denied motions by RLEA and UTU to compel certain documents. That decision was affirmed by the Commission in a decision served November 7, 1988.

[5] RLEA filed a response to that reply, and B&P and CSXT filed a motion to strike RLEA's response, or in the alternative, for leave to file a response, and RLEA filed a response to the motion to strike. By decision served May 11, 1988, the Chairman denied the motion to strike and admitted all the pleadings.

[6] A hearing on this transaction was conducted by the New York Department of Transportation (NYDOT), and the 250-page transcript of that hearing has been submitted in this proceeding. On July 27, 1988, NYDOT granted B&P a State certificate of public convenience and necessity to acquire and operate the line. Since this transaction involves interstate commerce, we have jurisdiction over it.

Rochester Southern Railroad, Inc. (RS). These railroads are located in western New York, and the RS terminus connects with the northern section of the line acquired by B&P here.

Walker is owned by Dumaines, a New Hampshire trust. (Dumaines also owns 99 percent of the voting stock of Bangor and Aroostook Railroad Company (Bangor).) Walker owns all of the stock of the Pittsburgh and Shawmutt Railroad Company (P&S). The P&S lines parallel in part and also connect to the line acquired by B&P in this proceeding.

B&P's board of directors consists of two directors from GWI and two from Walker. Its officers will be officers or executives of GWI and GWRR. GWI and Walker each contributed $2 million to B&P and received equal shares of stock. That stock has been pledged to the First National Bank of Boston (FNBB) to secure a loan for the purchase price and initial working capital.

CSXT/BRP employed about 220 workers on this line. B&P will employ approximately 160. By the terms of the sales agreement, B&P must offer jobs to at least 160 former employees on the line. Hiring priority will thereafter be given to GWRR and RS employees.

DISCUSSION AND CONCLUSIONS

RLEA and UTU argue that we should revoke the exemptions in both the control and acquisition. They argue that the criteria for revoking exemptions under section 10505(d) have been met for several reasons. We will discuss these arguments in section 1, below.

The main weight of RLEA's and UTU's arguments, however, is not that the exemptions should be revoked altogether, but rather that they should be conditioned to protect the interests of affected employees. These arguments can be grouped under two major headings. First, they argue that the acquisition and operation of

the CSXT line by the B&P is not subject to section 10901 at all, but rather is a transaction between two railroads, and as such is subject to section 11343 (under which we are required to impose labor protective conditions). A variant of that argument is also offered: that the two transactions (the acquisition and the control) are inseparable and that, therefore, the labor protective conditions mandated in the latter must be applied to the former. We will discuss these issues in sections 2 and 3, below.

Second, RLEA and UTU argue that, assuming the acquisition and operation to be properly within the scope of section 10901, we should exercise our discretion to impose labor protective conditions. We have said we will impose protective conditions in section 10901 transactions only in "exceptional circumstances." *See Class Exemption—Acq. & Oper. of R. Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985) (*Class Exemption*), *aff'd sub nom. Illinois Commerce Commission v. I.C.C.*, 817 F.2d 145 (D.C. Cir. 1987). We articulated the criteria for exceptional circumstances in Finance Docket No. 31205, *FRVR Corp.—Exemption Acquisition* (not printed), served January 29, 1988 (*FRVR*). We will discuss these arguments in section 4.

1. *Petitions to Revoke the Exemption.*

a. *False Information in the Notice.* UTU contends that the notice contained false and misleading information and should therefore be revoked. First, UTU contends that the notice misled the public about the scope of the transaction. The notice stated that a Class III carrier would be created by the transaction, when actually a Class II carrier was created. Second, UTU alleges the notice was false for not revealing details about a trackage rights agreement with New York, Susquehanna & Western Railroad (NYS&W) to handle double-stack trains.

B&P replies that it has not misled the public because the notice provided all relevant information about the transaction, including the amount of track involved, the affected shippers, and ancillary trackage rights. B&P contends that, for notice purposes, when accurate details are provided about the scope of a proposal, it is not relevant whether a carrier is classified as a Class II or III carrier. It also contends that there is no trackage rights agreement between B&P, NYS&W or CSXT for double-track trains. NYS&W has expressed interest in trackage rights over B&P's line, but no agreemnt has been reached. If such an agreement is entered into, B&P contends, it will file an appropriate application with the Commission.

There is no merit to UTU's contention that the notice contained false and misleading information. All relevant information was provided in the notice and the scope of the transaction was clear. Accordingly, whether B&P would be a Class II or III carrier was not material error which would cause the notice to be void.

We note that subsequent to the notice in this proceeding, *Class Exemption* was modified by decision served February 29, 1988 (*Class Exemption II*) to provide a longer notice period and more information when a transaction will involve a Class I or II carrier. However, in this proceeding, we authorized discovery, parties had an opportunity to obtain evidence, and to submit further evidence and arguments.[7] Indeed, the parties have more information about this transaction than they would have under *Class Exemption II*. Finally, we note that there was no misleading information concerning trackage rights with NYS&W, since no such agreement exists.

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[7] UTU participated in the NYDOT hearing. That hearing also provided an opportunity to obtain supporting data and details about the transaction which could form the basis for arguments before this Commission.

b. *Viability.* UTU contends that its main concern in this proceeding is the viability of the new B&P. (We assume this is a rail transportation policy-related argument. *See* 49 U.S.C. 10505(d).) It notes that this was the major focus of the NYDOT hearing. UTU is concerned that valuable double-stack traffic and coal may be diverted from B&P, and that not enough money has been allocated for purchasing locomotives.

UTU has made unsubstantiated, hypothetical arguments about the loss of certain traffic. B&P would, of course, have no reason to acquire the line if its prospects were as bleak as UTU alleges. We note that NYDOT, after a full hearing on the viability of the line, granted a certificate to B&P. The record before us includes traffice and revenue and expense projections indicating that B&P expects to be profitable, even in its first year of operation. UTU has provided no support for its concerns that would justify our questioning B&P's projections for a productive, efficient, and profitable operation centered on meeting the needs of local shippers.

In her letter petition, the legislator also expresses concern about the viability of B&P's operations. As discussed above, the mere allegation about the amount of overhead traffic that may be diverted is not compelling enough for us to substitute our judgment for B&P's assessment that it can operate this line profitably.[8] (The legislator's argument that more information is needed to assess these proposals was mooted by our authorizing discovery.)

c. *Limited Scope and Rail Transportation Policy Criteria.* UTU argues that the class exemption and the control exemption should be revoked because one of the key

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[8] The legislator also expresses concern about the viability of regional operators in general. We discussed this concern in some detail in *FRVR*, *supra*, at 2-3, where we explained that our policy of encouraging new regional carriers has been successful—new railroad formation has quickened, and service has been maintained and typically improved.

requirements of 49 U.S.C. 10505 has not been met. It contends that because B&P projects revenues of a Class II carrier, rather than a Class III carrier, the transaction is not of limited scope.

However, the criteria for revocation at 49 U.S.C. 10505(d) address rail transportation policy (RTP) issues, not the added exemption criteria of either limited scope or inability to abuse market power. That is, to exempt we must make an RTP finding and either a limited scope or inability to abuse market power finding. To revoke, the first criterion applies. This challenge is also a collateral attack on *Class Exemption* and *Class Exemption II*, where we made the necessary section 10505 findings.

Moreover, the limited scope finding, as noted above, is one of two alternative findings that may be made in connection with an RTP finding to support exemption. If we find no possibility of abuse of market power, we need not find limited scope. Even if a limited scope finding were a prerequisite, the size of a carrier, its revenues, and even the length of the involved line are not determinative of whether a transaction is of limited scope. We have affirmed the use of the class exemption in a transaction that created a Class II carrier operating a longer line segment than involved in this proceeding. *See* Finance Docket No. 31089, *Montana Rail Link, Inc.—Exemption Acq. and Oper.—Certain Lines of Burlington Northern R. Co.* (not printed), served May 26, 1988. This proposal involves fewer than 400 miles of track to be operated by a regional carrier, and the common control by GWI, Walker, and Dumaines will not affect the local nature of B&P's operations. Thus, UTU has not shown that the impacts of this proposal are such that it is not of limited scope.[9]

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[9] UTU also contends that the exemption should be revoked because discovery was denied. As a corollary, it argues that without more evidence it could not make a market abuse inquiry. Discovery

Further, UTU contends these proposals are not consistent with the RTP because of the impacts on labor and, therefore, the exemptions should be revoked. Impact on labor is but one policy consideration by the RTP. As discussed in the following sections, we have consistently found that these line sales exemptions promote many RTP goals. For example, the class exemption generally promotes 49 U.S.C. 10101a(2) (minimizing the need for regulation), 10101a(3) (promoting revenue adequacy), 10101a(4) (ensuring a sound transportation system to meet the needs of the public and the national defense), 10101a(5) (fostering sound economic conditions), and 10101a(7) (to reduce barriers to entry and exit). In this case, UTU claims an adverse impact on labor but, as discussed *infra*, fails to quantify that impact, and almost four-fifths of the former employees were to be offered jobs by the line's new owner. While there may be some labor dislocation and changes in working conditions, we cannot find on this record that revocation is warranted under the criteria of section 10505(d).

2. *Section 11343 versus Section 10901.*

RLEA contends that, due to the intra-corporate relationships involved here, B&P was already a railroad rather than a new corporate entity when it acquired this line. Therefore, it contends, this is a sale between a carrier and a group of carriers, subject to 49 U.S.C. 11343 and, accordingly, requiring imposition of employee protective conditions under section 11347.

RLEA notes that in recent cases the Commission has determined a newly formed entity's status by looking to indicia of the acquiring entity's independence from its parent corporation to determine whether the acquiring carrier was in fact formed exclusively to elude the otherwise applicable provisions of section 11343. *See* Finance

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was granted in this proceeding, and in conjunction with the NYDOT hearing, relevant operational and financial data was available.

Docket No. 30629, *Staten Is. R. Corp.—Exemp. from 49 U.S.C. 10901; Delaware Otsego Corp. and Staten Is. R. Corp.—Exemp. from 49 U.S.C. 11301* (not printed), served July 18, 1985 (*Staten Island*), *aff'd sub nom., Railway Labor Executives' Association v. U.S.*, 791 F.2d 994 (2d Cir. 1986) (*RLEA v. U.S.*); and Finance Docket No. 30779, *Rochester & S. R., Inc. and Genesee and W. Indust., Inc.—Exemp. from 49 U.S.C. 10901, 11301, and 11343* (not printed), served July 13, 1986 (*Rochester & Southern*), *aff'd sub nom. Railway Labor Executives Ass'n v. ICC*, 819 F.2d 1173 (D.C. Cir. 1987) (*RLEA v. ICC*).

Although in these cases we found, and the courts affirmed, that the new entities were noncarriers, RLEA points to factors it argues distinguish the instant case and require the Commission to ignore the allegedly separate corporate status of B&P and revoke the section 10901 exemption. RLEA points to the contribution of $2 million each by GWI and Walker in return for B&P stock which will be pledged as collateral for the loan with FNBB, and to the fact that all of B&P's assets will also be pledged as collateral. Another cited factor is what RLEA describes as a "loan agreement" between GWI and FNBB, that should be between B&P and FNBB. Thus, it contends, B&P is not financially independent and its obligations to FNBB are "guaranteed" in part by GWI and Walker.

RLEA also points to the fact that B&P is run by officers and directors of GWI and Walker, and that B&P will be operationally related to other subsidiaries of GWI and Walker. For example, B&P connects with the RS, a GWI subsidiary, and with the Walker subsidiary, P&S. In addition, B&P does not have its own sales or marketing staff, but will contract with the GWI subsidiary, GWRR, for those services. Also, B&P will rely on the P&S and GWI, Leasing (another subsidiary of GWI) as

sources for additional rail cars, and may even hire employees from RS and GWRR.

Further, RLEA contends that B&P's acquisition resulted from a right to purchase this line that came about because of a prior acquisition by RS of CSXT's Rochester to Ashford, NY line. In connection with the RS transaction, GWI acquired the right of first refusal to purchase the line involved here.

RLEA concludes that all of these factors demonstrate that B&P is not independent of its parents and affiliated corporations, and therefore it must be treated as a carrier. Accordingly, this transaction would be covered by section 11343 and not 10901.

RLEA correctly notes that *Rochester & Southern* and *Staten Island*, *supra*, are the lead cases where we set forth the analysis for determining whether a newly formed corporate entity is sufficiently independent of its corporate parent so as to treat it as a noncarrier under section 10901. In affirming *Rochester & Southern* in *RLEA v. ICC*, the D.C. Circuit stated at 1173:

> [T]he ICC is not *compelled* to ignore corporate formalities, but may instead decide each case on its own facts, treating related entities as separate where, in its judgment, the facts demonstrate sufficient *indicia of independence*. (Last emphasis added.)

In *Rochester & Southern*, RS, a newly formed entity, was wholly owned by GWI. RS issued all of its stock to GWI in exchange for cash and other assets. In that proceeding, RLEA raised the same arguments it has raised in this proceeding. We rejected those arguments (at p. 5) and concluded:

> Although a control relationship exists between RS and GWI, it does not warrant a finding that they are one and the same and that section 11343 applies. There is no evidence to suggest that RS was formed

> exclusively to elude the otherwise applicable provisions of section 11343. To the contrary, the evidence suggests that RS was formed to distance GWI from the risks RS would assume upon commencing operations. RS has assumed all the risks of the venture on its own and is not financially guaranteed by its parent. Given the above indications of independence, we must conclude that RS is a new enterprise and a noncarrier. . . .

Likewise, in *Staten Island* a new subsidiary was created to acquire and operate a rail line. There, the parent corporation negotiated with the seller for the sale of the line to its subsidiary, shared common officers and directors with the subsidiary, and also took steps to hire employees for the new company. Moreover, in *Staten Island* the parent guaranteed payment of the acquiring subsidiary's financial obligations to the seller. The Commission found, and the court affirmed, that the new entity and not the parent had assumed the risks of the venture, that the entity had been created for a legitimate business purpose, and accordingly the new entity was not a carrier and the acquisition was governed by section 10901. *RLEA v. U.S.*, *supra*, at 1006.

Here, B&P, a newly formed corporation, will own and operate the line, and will publish tariffs and hold out service in its own name and for its own account. B&P will conduct its own operations on the line and directly serve the line's shippers. It will be responsible for its own financial and contractual obligations and acquire equipment and materials in its own name and for its own account. B&P will hire its own employees, and will have officers and directors who will be named in accordance with State law.

This acquisition has not been financially guaranteed by GWI and Walker, and therefore there is less involvement than in *Staten Island*, where the parent corporation actu-

ally quaranteed payment of the acquiring subsidiary's financial obligation to the seller. GWI's and Walker's pledge of their B&P stock as security for the FNBB loan to B&P imposes no responsiblity for B&P's liabilities on the parent corporations. This pledge merely permits FNBB more easily to take control of B&P's assets if B&P defaults on the loan. Moreover, the loan commitment letter (not the "loan agreement" as alleged by RLEA) from FNBB to GWI does not negate B&P's financial independence—it provides no guarantee to FNBB by the parents of B&P's future indebtedness, and is simply a statement by FNBB of its willingness to lend funds to B&P. The fact that the letter was sent to one of B&P's two controlling shareholders does not show B&P is not financially separate.

Likewise, B&P's initial capitalization by GWI and Walker does not show that it is not a separate corporation, responsible for its own debts. B&P alone is financially responsible for its own operations, indebtedness, and contracts, and the only risk assumed by GWI and Walker is to the extent of their initial capital contributions to B&P.

In both *Staten Island* and *Rochester & Southern* the parents and subsidiaries shared common officers and directors. In *Staten Island*, the parent corporation took steps to hire employees for the corporation. Also, in *Staten Island*, like GWI's acquisition of the right of first refusal from CSXT here, the parent corporation negotiated with the seller for the sale of the line to its subsidiary.

The fact that the B&P line will connect with related rail carriers does not indicate that they are one and the same company. Also, that B&P may hire some employees from GWRR and RS does not prove this either. The parent company, GWI, has an interest in seeing that B&P is fully and properly staffed. (GWI has authority to control B&P, and this is merely a lawful incident of that control.)

Finally, the right of first refusal acquired by GWI and later exercised by B&P is not determinative of whether B&P is a separate entity. The right of first refusal says nothing about whether they are now operated as separate companies. And unlike those cases where all the stock was owned by one corporate parent, GWI and Walker are each 50 percent shareholders, and each has equal representation on the Board of Directors. Thus, there are good business reasons for B&P to be separately incorporated.

RLEA argues that the Commission should broaden its definition of "rail carrier" to include non-carrier affiliates of carriers. It contends that under the current analysis there is virtually no situation where a subsidiary or affiliate of a carrier would be considered a carrier. Thus, RLEA argues, any carrier can evade section 11343 and the labor protective conditions required by section 11347 by creating a subsidiary to acquire rail lines.

The plain language of section 11343 shows that it applies only to the acquisition of property of another carrier by a carrier or carriers. Section 11347 gives mandatory labor protection for employees that are affected by such consolidations. Where a new entity is formed for the sole purpose of evading application of section 11343 and the transaction is a "sham" to conceal a rail consolidation, we have discretion to apply section 11343. But here, there were good business reasons to form a new business entity to acquire this carrier property. The mere change in ownership from a Class I carrier to a noncarrier does not affect a consolidation of carrier properties.

Not imposing costly employee protective conditions on such transactions enables rail carriers to sell marginally profitable lines to new regional or shortline carriers who may operate the lines more economically. The result is that rail service is preserved, the new railroad provides employment prospects for affected employees, and a major rail carrier is relieved of an economically draining line. *See Class Exemption, supra,* at 813.

Labor protection for affected employees is only one of many conflicting concerns of the RTP. This concern must be balanced against the benefits, discussed above, resulting from not imposing employee protection on acquisitions by new carriers. The courts have affirmed the balance we have struck, and RLEA has presented no sound legal or policy argument for us to modify it.

3. *The Relationship between the 11343 Control Proceeding and the 10901 Acquisition Proceeding.*

RLEA also argues that when employee protective provisions are imposed on a control transaction under section 11343, section 11347 then becomes applicable, and that provision requires protection for *all* employees who are adversely affected by the transaction, regardless of whether they are employees of the carrier seeking Commission authorization for the transaction. RLEA contends that labor protection imposed by the Commission in the control transaction must be applied to benefit employees affected by the acquisition because the acquisition is part of an inseparable arrangement. The union concludes that the two transactions here are inseparable and, accordingly, CSXT/BRP employees are affected by the control transaction and employee protection imposed in the control proceeding should apply to those employees.

RLEA's arguments are without merit and are contrary to Commission and court precedent.[10] We recently

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[10] RLEA cites several old Commission decisions under former sections 1(18) (now 10901) and 5(2) (now 11343) in which employee protection was mandated for employees of carriers involved in the section 1(18) transaction. These cases predate our 1982 clarification of policy on labor protection for new short line and regional carriers. *See Knox and Kane R. Co.—Petition for Exemption*, 366 I.C.C. 439 (1982) (*Knox and Kane*). Moreover, those decisions, for the most part, concern the imposition of labor protection on a carrier directly involved in a transaction when that carrier's employees were affected directly and not through another transaction for which separate statutory approval was required. *Texas and Pacific Ry.*, 247 I.C.C. 285 (1941); *Gulf, Mobile & Ohio*

rejected this argument in a case where the relevant facts were virtually identical to those in this case. *See* Finance Docket No. 31206, *Itel Rail Corporation and Itel Corporation—Continuance In Control Exemption—FRVR Corporation* (not printed), served September 12, 1988, at p. 3 (*FRVR-Control*). We explained there that the control transaction directly affects only employees of carriers in the commonly controlled system and those employees are protected under *New York Dock*. The seller is not a party to the control transaction and its employees are not directly affected by it, unless, of course, they have become employees of the new carrier. Likewise, here, the fact that CSTX/BRP was the vendor in the acquisition transaction provides no basis for providing protection for its employees in the control proceeding.

We have consistently rejected the argument that employee protection should be extended to employees of carriers not party to the section 11343 transaction which gave rise to the mandatory protection. *See Milwaukee Reorganization—Acq. by GTC*, 2 I.C.C.2d 161, 221 (1984); *Guilford Transp. Industries, Inc.—Control—B&M Corp.*, 366 I.C.C. 292, 344 (1982); and *Burlington Northern, Inc.—Control & Merger—St. L.*, 360 I.C.C. 784, 948-950 (1980). This policy was explained in detail in *FRVR—Control*, *supra*, and it has been affirmed by the courts.[11] As we noted in *FRVR—Control* at 3, in *Crounse*

Railroad Company, 282 I.C.C. 311 (1951); *Louisiana & Arkansas Railway Co.—Abandonment*, 290 I.C.C. 434 (1954); *New Orleans Passenger Terminal*, 267 I.C.C. 763 (1948); and *Seaboard Air Line R. Co. Trackage Rights*, 312 I.C.C. 797 (1962).

[11] RLEA points to two court cases which it argues support its position: *RLEA v. United States*, 216 F.Supp. 101 (E.D. Va. 1963) and *Soo Line Railroad Co. v. United States*, 280 F.Supp. 907 (W.D Minn. 1968). The Commission and the courts have consistently refused to follow these cases. *E.g. Missouri-Kansas, Texas R. Co. v. United States*, 632 F.2d 392, 411, fn. 46 (5th Cir. 1980); and *Lamoille Valley R. Co. v. I.C.C.*, 711 F.2d 295, 324, fn. 62 (D.C. Cir. 1983).

Corp. v. I.C.C., 781 F.2d 1176, 1193 (6th Cir., 1986), the court stated that ". . . every court of appeals that has considered the question has concluded that section 11347 does not apply to employees not directly involved in the transaction (citated omitted)." *Accord* Finance Docket No. 31186, *MidSouth Corporation—Continuance in Control Exemption—Southeastern Rail Corporation* (not printed), served February 12, 1988, *aff'd mem. sub nom. RLEA v. ICC*, U.S.C.A. 6th Cir. No. 88-3311 (March 17, 1989).

We note that this policy does not, however, deny RLEA an opportunity to justify employee protective conditions in the acquisition proceeding. *See FRVR—Control*, *supra*, at 3-4. RLEA may petition for protective conditions, and it has the burden of showing that exceptional circumstances require the imposition of discretionary protective conditions. It has done so in this case, and we will discuss these arguments now.

4. *Discretionary Employee Protective Conditions.*

RLEA contends that, if we find that the acquisition is properly covered by section 10901, we should exercise our discretion and impose protective conditions on either B&P or CSXT. It relies on *Class Exemption*, *supra*, at 815, where we stated:

> If an exceptional showing of circumstances justifying the imposition of labor protection is made, the Commission is empowered to revoke the exemption, . . . and impose labor protection.

RLEA contends that it has made an exceptional showing. As a result of this transaction, it argues, between 60 and 140 individuals will lose their jobs, and those employees who are hired by B&P will suffer a 15 percent reduction in compensation.

RLEA also contends that the Commission's reasons for not imposing conditions in the class exemption are not

relevant here. There we stated that employee protective conditions result in increased costs, discourage sales, and thus may result in deterioration of a line and later abandonment. Since CSXT had not threatened to abandon the line involved here, RLEA contends that reasoning is not applicable. In addition, it is argued that all of the railroads involved here will obtain substantial benefits from this transaction; therefore, RLEA claims, the Commission can not assume that employee protective costs are too burdensome or that the costs would thwart the transaction.

RLEA has the burden of proof to show that exceptional circumstances warrant the imposition of employee protective conditions. In *FRVR*, we explained that we might find exceptional circumstances and impose labor protection if we find: (1) that there was a misuse of Commission rules or precedent; (2) that existing labor contracts specified that line sales were subject to procedural or substantive protection; or (3) that injury to affected employees was unique, disproportionate to the gains achieved for the local transportation system, and that the injury could be compensated for without causing termination of the transaction or substantially undoing the prospective benefits of the Commission's existing policy for other communities and locales. *See FRVR* at 3-4.

First, we find no misuse of our rules here. As discussed above, the sale and control transactions were proper and implemented according to our rules.

Second, RLEA has submitted nothing to indicate that any existing labor contract requires protection for CSXT/BRP employees affected by the sale at the level of *New York Dock* (the level of protection imposed in the control proceeding). The record does indicate that B&P is offering employment to almost two-thirds of the affected employees, and that others are eligible for protective benefits under their current collective bargaining agreements with CSXT.

Third, we do not find the injury to be unique or disproportionate to the gains achieved, or that compensation for the injury would not result in termination of the transaction. RLEA has not shown the specific scope of the impacts on affected employees. B&P has been operating this line since July 19, 1988, and specific information about the impact on employees should now be available (in particular how many employees are affected and what further protection is desired beyond that provided by the relevant collective bargaining agreements).

CSXT's claim that labor protection might cost as much as $60 million is overstated. It bases this figure on the assumption that 225 employees will receive dismissal allowances for 6 years (CSXT's answer to Second Interrogatories at 3). The evidence indicates that there are 212 active employees (Massie Aff., at 2). Moreover, CSXT's calculation does not take into account B&P's commitment to offer jobs to 160 CSXT employees. However, even if fewer employees were affected, the cost of labor protection would be high, and CSXT has stated that, if the sale is too costly, the transaction would be thwarted (Massie Aff., at 5). Without more evidence on this point, we must conclude that RLEA has not met its burden to show that the cost of labor protection would not preclude this transaction.

The question of whether the injury to labor is unique has not been addressed; the evidence in this proceeding was filed before *FRVR*, was issued. There is no evidence, however, to distinguish this sale from others where no employee protective conditions were imposed on the seller.

CSXT and B&P have made a good faith effort to protect labor by including in their contract a requirement that jobs be offered to at least 160 out of 212 CSXT employees affected. RLEA has made no effort to show the true extent of the injury to employees—they have not quantified the actual adverse effects of the transaction on employees, for

example, by discussing other severance arrangements that are available.

Contrary to RLEA's arguments, the line involved here is clearly the type of line to which *Class Exemption* was designed to apply. The possibility of abandonment discussed in that rulemaking need not be imminent. As we explained there, in *Knox and Kane, supra*, and in Finance Docket No. 30555, *Northwestern Pacific Acquiring Corp. and Eureka Southern R. Co.—Exemption* (not printed), served January 8, 1988 (*Eureka*), our concern is that the cost of employee protective conditions might discourage the sale of marginal rail facilities and thus result in a carrier continuing to operate a line while deferring maintenance (thereby minimizing out-of-pocket losses). The line would then continue to deteriorate until it was no longer marketable and abandonment would be the only option. We concluded in *Eureka*, at p. 4:

> . . . [R]ail carriers should be encouraged to sell lines they could not profitably serve or were not interested in serving to entities who would continue to operate them.

CSXT's sale of this line to a newly created carrier to operate fits squarely within the type of line we intended to be covered by the class exemption.

RLEA also claims that employee protective conditions are appropriate because the carriers involved in the transactions, as well as related subsidiaries, will benefit from the transaction. But, the benefits that may accrue might be negated by the cost of labor protection. As for B&P, we have determined that it is embarking on this venture as an independent corporate entity; it will be wholly responsible for losses and it alone will enjoy profits. As we have stated in several recent cases, the financial burden of starting a new operation is great enough without routinely increasing that burden with employee protection.

We conclude that labor has not shown exceptional circumstances that warrant discretionary imposition of labor protection on either the buyer or the seller.[12] The acquisition proposal here is in the public interest overall, notwithstanding that it will have some adverse impacts on affected employees. The scope of these adverse impacts is unclear, and, overall, rail labor will benefit by the preservation of jobs and the additional employment opportunities that will arise if B&P is successful. *See Eureka*, *supra*, at 11.

RLEA and UTU have failed to carry their burden of proof to show either that the exemptions should be revoked or that the Commission should impose extraordinary conditions. Accordingly, the petitions are denied.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petitions to revoke or for reconsideration are denied. RLEA's and UTU's requests for employee protective conditions in Finance Docket No. 31116 are denied.

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[12] RLEA also argues that protective conditions should be imposed on the seller, CSXT, in this instance because it is abandoning service on a rail line, an act which would require protection under 49 U.S.C. 10903(b)(2). In *Knox and Kane*, *supra*, we enunciated the policy not to impose employee protective conditions routinely on the seller in an acquisition proceeding. Since then, we have consistently rejected the request that employee protective cost be born by the seller, and we have firmly rejected the comparison of a sale to an abandonment. *See* Finance Docket No. 30457, *San Diego & Imperial Valley Railroad Co. Inc.—Exemp.—From 49 U.S.C. 10901 and 11301* (not printed), served July 27, 1988, at 8, and *Eureka*, *supra*, at 4, fn. 5. In those cases, we discussed in detail our discretion under section 10901 concerning these conditions, and we found that the public interest requires us to encourage the sale of marginally profitable lines in lieu of abandonment. As discussed above, RLEA has not shown exceptional circumstances warranting employee protection, nor has it shown why we should alter our established policy against imposing the costs of protection on the seller.

2. This decision is effective on the date served.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Andre, Lamboley, and Phillips. Vice Chairman Simmons and Commissioner Lamboley dissented with separate expressions.

NORETA R. MCGEE
Secretary

[SEAL]

VICE CHAIRMAN SIMMONS, dissenting:

The majority again applies the "exceptional circumstances" test in a manner which effectively precludes petitioners from prevailing on the merits of their arguments. At the least, I believe a more thorough weighing of labor interests is called for. The majority dismisses the issue of the extent of injury to affected employees with a burden of proof analysis. I believe we have some responsibility to quantify that injury before making our decision. This is especially true in the context of the instant transaction where an abandonment seemed far from imminent. With annual volumes of 57,000 cars and revenues of $27 million, the balance of public interest concerns associated with Section 10901 sales does not weigh so heavily in favor of an unencumbered transaction.

COMMISSIONER LAMBOLEY, dissenting:

I cannot now join my colleagues in disposition of the current issues, just as I have not been able to do so previously in this case. My reasons are several.

First, I fail to view discovery as a mere procedural matter. It is a significant and substantial method for the development and presentation of evidentiary facts and argument essential to the causes of all litigants, and it

is basic to the Commission record and decision, irrespective of positions advocated. In this case, as in others, I find that the majority takes an unduly narrow view by denial of discovery requested.[1] Considering the burden of proof, denial unnecessarily and unfairly compromises the ability of the employees to submit the best possible case.[2]

Second, the transactions in this case, as have others, claim the benefits of class exemption of Ex Parte No. 392 (Sub-No. 1)[3] which blends the acquisition under § 10901 and exemption authority of § 10505. Here, however, it is not altogether clear that only § 10901 is relevant. Transactions may frequently involve aspects of both § 10901 and § 11343. The line of demarcation is not always clearly defined. In short, transactions may involve both § 10901 and § 11343 since the statutes are compatible and are not to be construed as mutually exclusive.[4] The corporate structuring and integrated nature of the transactions involving carrier enterprises may qualify for consideration under § 11343. Denial of discovery may well have constrained the opportunity to more fully demonstrate the interrelationship.[5]

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[1] See my dissent to *Decision* (not printed), served November 7, 1988.

[2] The administrative process need not curtail discovery on the grounds of efficiency. Proceedings in this case, as in others, demonstrate the lack of efficiency and generation of appellate issues inherent in *denials* of discovery.

[3] Ex Parte No. 392 (Sub-No. 1) *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985).

[4] See *People of Illinois v. I.C.C.* 604 F.2d 519 (7th Cir. 1979).

[5] Proceedings in the State of New York referred to by the majority, did not have the benefit of discovery and document production as the ALJ there noted. The Commission decision on discovery requests was pending. *Transcript* of Proceedings Case No. 30802 NY DOT, November 19, 1987 p. 242.

Third, the class exemption of Ex Parte No. 392 (Sub-No. 1) is not promised on a "limited scope" finding under § 10505(2)(A). However, the majority refers to and discusses this transaction in terms of that proviso. By so doing, the majority, in my view, effectively removes the case from the class exemption and its related assumptions and findings. The case is treated as if it were a case specific exemption transaction.[6]

Finally, I continue to be disappointed by the Commission's approach which routinely denies consideration of fashioning of labor protection conditions (LPC) in transactions presented under the § 10901 class exemption of Ex Parte No. 392 (Sub-No. 1).[7] The "discretionary" policy not to impose LPC except in "exceptional or extraordinary circumstances" has *never* been exercised in favor of doing so in *any* case decided by the Commission since issuance of Ex Parte No. 392 (Sub-No. 1).[8] The "weighing and balancing" of respective interests of prior precedent has now been discarded. *Cf. Knox & Kane Railroad Co.—Gettysburg R. Co.—Petition for Exemption Under 49 U.S.C. 10505 from 49 U.S.C. 10901, 11343 and 11301*, 366 I.C.C. 439 (1982). The evolution from automatic *imposition* has now given way to automatic *denial* of conditions.

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[6] The majority engaged in similar reasoning in a recent decision involving the Chicago, Missouri & Western. See FD No. 30911, *Chicago, Missouri & Western Ry. Co.—Exemption Acquisition and Operation—Illinois Cen. & Gulf R. Co.*, (not printed), served June 21, 1989.

[7] Note, supra note 3.

[8] The exemption cases now exceed 166 in number and include some 30 (counting this proceeding) protested or contested cases. In every one of the contested cases, as well as the uncontested, no attempt to craft conditions was made. A majority of the Commission simplistically views the choice of conditions as being *New York Dock* or none, and chooses the latter. In each case I have dissented in part regarding disposition of labor related issues. See cases listed in Appendix A.

In my view, matters requiring analysis of the relative benefits, burdens and consequences have been dealt with in summary fashion, by consistent denial, with various explanations attempted upon judical remand to the Commission. The results, however, have been uniform, *no* conditions of *any* kind have been imposed on *any* party in any case involved in an exempt transaction under § 10901. No distinction or allocation of responsibility is made between the status of *seller* and *buyer* relative to the assessment of the impact of the sale transaction on the *seller's* employees, and its statutory and/or contractual relations under the Railway Labor Act (RLA).

Appropriate accommodation of transportation and labor laws can be achieved, as it has for the past 50 years, without asserting claims of pre-emption. The statutory policies and purposes of the Interstate Commerce Act (ICA) and Railway Labor Act (RLA) can be reconciled, construed and implemented harmoniously consistent with public interests involved in § 10901 transactions, as has been done in other transportation transactions.[9] Employee protective conditions have been the vehicle which bridges the statutory scheme of the ICA and RLA called into play by transactions such as here. I believe conditions can and should be fashioned that contain both *procedural* and *substantive* provisions appropriate to the circumstances. This analytical effort, the majority has routinely declined to undertake.

In my view, the majority again not only fails to fairly evaluate the case before us, but fails to take advantage of the opportunity for constructive resolution of what has become a continuing and destabilizing problem in transactions invoking the class exemption of Ex Parte No. 392 (Sub-No. 1).

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[9] See *Pittsburgh & Lake Erie R. Co. v. RLEA*, —— U.S. —— (Case Nos. 87-1589 and 87-1888, decided June 21, 1989 Slip op. at 17, 19) in which the Court makes clear that the ICA and RLA are not in conflict, and should be construed harmoniously.

As it has in other cases, for purposes of cost/benefit analysis the majority concedes that the seller's evidence regarding the cost is obviously and substantially overstated. Nevertheless, the majority refuses closer scrutiny and cements its position of denial by imposing an enhanced evidentiary burden on the employees for all aspects of protective condition considerations.

APPENDIX A

See decisions, and separate expressions in:

Ex Parte No. 392 (Sub-No. 1), *Class Exemption for The Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985), *aff'd sub nom Illinois Commerce Commission v. I.C.C.*, 817 F.2d 145 (D.C. Cir. 1987).

Finance Docket No. 30628, *Lackawanna County Railroad Authority, Inc.—Exemption From Regulation*, (not printed) served February 11, 1986.

Finance Docket No. 30764, *Arkansas and Missouri Railroad, Et Al.—Exemption From 49 U.S.C. 10901, 11301, 11322 and 11343*, (not printed) served July 17, 1986 and February 9, 1987.

Finance Docket No. 30779, *Rochester and Southern Railroad, Inc.* and *Genesee and Wyoming Industries, Inc.—Exemption From 49 U.S.C. 10901, 11301, and 11343*, (not printed) served July 18, 1986.

Finance Docket No. 30754, *Huron and Eastern Railway Company—Exemptions*, (not printed) served September 12, 1986.

Finance Docket No. 30789, *Indiana Rail Road Company—Exemption—Acquisition and Operation*, (not printed) served October 10, 1986 and April 16, 1987.

Finance Docket No. 30861(A), *City of Austin, TX—Acquisition—Southern Pacific Transportation Company*, (not printed) served November 4, 1986.

Ex Parte No. 395 (Sub-No. 1), *Keokuk Northern Real Estate Company and Keokuk Junction Railway Company —Election of Exemption*, (not printed) served November 28, 1986 and May 5, 1987.

Finance Docket No. 30911, *Chicago, Missouri & Western Railway Company—Exemption Acquisition and Operation*

—*Illinois Central Gulf Railroad Company*, (not printed) served December 5, 1986 and May 12, 1987.

Finance Docket No. 30891, *Paducah & Louisville Railway, Inc.—Acquisition and Operation Exemption—Illinois Central Gulf Railroad Company*, (not printed) served May 11, 1987.

Finance Docket No. 31059, *Central Michigan Railway Company—Acquisition and Operation—Certain Lines of Grand Trunk Western Railroad Company*, (not printed) served September 4, 1987 and December 10, 1987.

Finance Docket No. 30915, *Otter Tail Valley R. Co.—Acq. & Optn. Exemption—Burlington Northern R. Co.* (not printed), served July 2, 1987 and January 22, 1988.

Finance Docket No. 31121, *P&LE Railco, Inc.—Exemption Acquisition and Operation Lines of the Pittsburgh and Lake Erie Railroad Company and the Youngstown and Southern Railway Company*; Finance Docket No. 31122, *Chicago West Pullman Corporation—Continuance in Control Exemption—P&LE Railco, Inc. and—Control Exemption—The Pittsburgh, Chartiers and Youghiogheny Railway Company*; Finance Docket No. 31126, *Railway Labor Executives' Association v. Pittsburgh & Lake Erie Railroad Co., et al.* (not printed), served September 29, 1987 and October 19, 1987.

Finance Docket No. 31102, *Wisconsin Central—Ltd—Exemption Acquistion and Operation—Certain Lines of Soo Line Railroad Co.*, (not printed), served October 8, 1987 and July 28, 1988.

Finance Docket No. 30918, *KNRECO, Inc., d/b/a Keokuk Jnctn. Ry.—Acq. & Optn Exemption—ATSF* (not printed), served October 29, 1987 and April 28, 1988.

Finance Docket No. 31113, *TP&W Acquisition Corp.—Exemption Acq. & Optn—Certain Lines of ATSF* (not printed), served November 9, 1987 and January 4, 1988.

Finance Docket No. 31038, *Chicago, Missouri & Western—Trackage Rights—Chicago—South Shore & So. Bend R. Co.* (not printed), served December 3, 1987.

Finance Docket No. 31163, *Winona Bridge Ry. Co.—Trackage Rts—Burlington Southern R. Co.* (not printed), served January 7, 1988.

Finance Docket No. 30555, *Northwestern Pac. Acquiring Corp. & Eureka Southern Ry. Co.—Exemption From 49 U.S.C. 10901 and 11301* (not printed), served January 8, 1988.

Finance Docket No. 31082, *Kiamichi R. Co., Inc.—Exemption Acq. & Optn—Certain Lines of Burlington Northern, Inc.* (not printed), served January 7, 1988.

Finance Docket No. 31205, *FRVR Corp.—Exemption Acq. & Optn—Certain Lines of CNW—Petn. for Clarification* (not printed), served January 29, 1988 and February 28, 1989.

Finance Docket No. 31094, *Grainbelt Corp.—Acq. & Optn. —Exemption—Burlington Northern R. Co.* (not printed), served February 2, 1988.

Finance Docket No. 30965, *Delaware & Hudson Ry. Co.—Lease & Trackage Rights Exemption—Springfield Terminal Ry. Co.* (not Printed), served February 19, 1988.

Finance Docket No. 31089, *Montana Rail Link, Inc.—Exemption Acq. & Optn—Certain Lines of Burlington Northern R. Co.* (not printed), served May 26, 1988 and December 14, 1988.

Finance Docket No. 31116, *Buffalo & Pittsburgh Railroad, Inc.—Exemption—Acquistion and Operation of Lines in New York and Pennsylvania,* served October 19, 1987.

Finance Docket No. 31187, *Southeastern Rail Corporation —Acquistion and Operation Exemption—Gulf and Mississippi Railroad Corporation,* served March 7, 1988.

Finance Docket No. 31346, *Rail Holdings, Inc.—Acquisition and Operation Exemption—Paducah & Louisville Railway, Inc.* Finance Docket No. 31346 (Sub-No. 1), *Paducah & Louisville Railway Partnership—Acquisition and Operation Exemption—Rail Holdings, Inc.*, (not printed), served November 18, 1988.

Finance Docket No. 30640, *Rarus Railway Corporation—Exemption From 49 U.S.C. 10901 and 11301*, (not printed) decisions served April 26, 1985, April 24, 1986, February 13, 1987, and May 9, 1989.

APPENDIX F

STATUTES RELIED UPON

INTERSTATE COMMERCE ACT, 49 U.S.C. § 10101, *et seq.* (Excerpts)

A. Section 10505

49 U.S.C. § 10505

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle—

(1) is not necessary to carry out the transportation policy of section 10101a of this title; and

(2) either (A) the transaction or service is of limited scope; or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

(b) The Commission may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party.

(c) The Commission may specify the period of time during which an exemption granted under this section is effective.

(d) The Commission may revoke an exemption, to the extent it specifies, when it finds that application of a provision of this subtitle to the person, class, or transportation is necessary to carry out the transportation policy of section 10101a of this title.

(e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11707

of this title. Nothing in this subsection or section 11707 of this title shall prevent rail carriers from offering alternative terms nor give the Commission the authority to require any specific level of rates or services based upon the provisions of section 11707 of this title.

(f) The Commission may exercise its authority under this section to exempt transportation that is provided by a rail carrier as a part of a continuous intermodal movement.

(g) The Commission may not exercise its authority under this section (1) to authorize intermodal ownership that is otherwise prohibited by this title, or (2) to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle.

B. Section 10901

49 U.S.C. § 10901

§ 10901. Authorizing construction and operation of railroad lines

(a) A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may—

(1) construct an extension to any of its railroad lines;

(2) construct an additional railroad line;

(3) acquire or operate an extended or additional railroad line; or

(4) provide transportation over, or by means of, an extended or additional railroad line;

only if the Commission finds that the present or future public convenience and necessity require or will be enhanced by the construction or acquisition (or both) and operation of the railroad line.

(b) A proceeding to grant authority under subsection (a) of this section begins when an application is filed. On receiving the application, the Commission shall—

(1) send a copy of the application to the chief executive officer of each State that would be directly affected by the construction or operation of the railroad line;

(2) send an accurate and understandable summary of the application to a newspaper of general circulation in each area that would be affected by the construction or operation of the railroad line;

(3) have a copy of the summary published in the Federal Register;

(4) take other reasonable and effective steps to publicize the application; and

(5) indicate in each transmission and publication that each interested person is entitled to recommend to the Commission that it approve, deny, or take other action concerning the application.

(c) (1) If the Commission—

(A) finds public convenience and necessity, it may—

(i) approve the application as filed; or

(ii) approve the application with modifications and require compliance with conditions the Commission finds necessary in the public interest; or

(B) fails to find public convenience and necessity, it may deny the application.

(2) On approval, the Commission shall issue to the rail carrier a certificate describing the construction or acquisition (or both) and operation approved by the Commission.

(d) (1) Where a rail carrier has been issued a certificate of public convenience and necessity by the Commission authorizing the construction or extension of a railroad line, no other rail carrier may block such construction or extension by refusing to permit the carrier to cross its property if (A) the construction does not unreasonably interfere with the operation of the crossed line, (B) the operation does not materially interfere with the operation of the crossed line, and (C) the owner of the crossing line compensates the owner of the crossed line.

(2) If the carriers are unable to agree on the terms of operation or the amount of payment for purposes of paragraph (1) of this subsection, either party may submit the matters in dispute to the Commission for determination.

(e) The Commission may require any rail carrier proposing both to construct and operate a new railroad line pursuant to this section to provide a fair and equitable arrangement for the protection of the interests of railroad employees who may be affected thereby no less protective of and beneficial to the interests of such employees than those established pursuant to section 11347 of this title.

C. Section 11343.

49 U.S.C. § 11343

(a) The following transactions involving carriers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I (except a pipeline carrier), II, or III of chapter 105 of this title may be carried out only with the approval and authorization of the Commission:

(1) consolidation or merger of the properties or franchises of at least 2 carriers into one corporation for

the ownership, management, and operation of the previously separately owned properties.

(2) a purchase, lease, or contract to operate property of another carrier by any number of carriers.

(3) acquisition of control of a carrier by any number of carriers.

(4) acquisition of control of at least 2 carriers by a person that is not a carrier.

(5) acquisition of control of a carrier by a person that is not a carrier but that controls any number of carriers.

(6) acquisition by a rail carrier of trackage rights over, or joint ownership in or joint use of, a railroad line (and terminals incidental to it) owned or operated by another rail carrier.

(b) A person may carry out a transaction referred to in subsection (a) of this section or participate in achieving the control or management, including the power to exercise control or management, in a common interest of more than one of those carriers, regardless of how that result is reached, only with the approval and authorization of the Commission under this subchapter. In addition to other transactions, each of the following transactions are considered achievements of control or management:

(1) A transaction by a carrier has the effect of putting that carrier and person affiliated with it, taken together, in control of another carrier.

(2) A transaction by a person affiliated with a carrier has the effect of putting that carrier and persons affiliated with it, taken together, in control of another carrier.

(3) A transaction by at least 2 persons acting together (one of whom is a carrier or is affiliated with a carrier) has the effect of putting those persons and carriers and persons affiliated with any of them, or with any of those affiliated carriers, taken together, in control of another carrier.

(c) A person is affiliated with a carrier under this subchapter if, because of the relationship between that person and a carrier, it is reasonable to believe that the affairs of another carrier, control of which may be acquired by that person, will be managed in the interest of the other carrier.

(d)(1) Approval and authorization by the Commission are not required if the only parties to a transaction referred to in subsection (a) of this section are motor carriers providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title and the aggregate gross operating revenues of those carriers were not more than $2,000,000 during a period of 12 consecutive months ending not more than 6 months before the date of the agreement of the parties covering the transaction. However, the approval and authorization of the Commission is required when a motor carrier that is controlled by or affiliated with a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter is a party to the transaction.

(2) The approval and authorization of the Commission are not required if the only parties to a transaction referred to in subsection (a) of this section are street, suburban, or interurban electric railways that are not controlled by or under common control with a carrier that is operated as part of a general railroad system of transportation.

(e)(1) Notwithstanding any provisions of this title, the Interstate Commerce Commission, in a matter re-

lated to a motor carrier of property providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title, may exempt a person, class of persons, transaction, or class of transactions from the merger, consolidation, and acquisition or control provisions of this subchatper if the Commission finds that—

(A) the application of such provisions is not necessary to carry out the transportation policy of section 10101 of this title; and

(B) either (i) the transaction is of limited scope, or (ii) the application of such provisions is not needed to protect shippers from the abuse of market power.

(2) At least 60 days before any transaction exempt under this subsection from the merger, consolidation, and acquisition of control provisions of this subchapter may take effect, each carrier intending to participate in such transaction shall file with the Commission a notice of such intention. The Commission shall prescribe the information to be contained in such notices, including the nature and scope of the transaction.

(3) The Commission, on its own initiative or on complaint, may revoke an exemption granted under this subsection, to the extent it specifies, when it finds that application of the provisions of this section to the person, class of persons, or transportation is necessary to carry out the transportation policy of section 10101 of this title.

(4) If the Commission, on its own initiative, finds that employees of any carrier intending to participate in a transaction exempt under this subsection from the merger, consolidation, and acquisition of control provisions of this subchapter are or will be

adversely affected by such transaction or if employees of such carrier adversely affected by such transaction file a complaint concerning such transaction with the Commission, the Commission shall revoke such exemption to the extent the Commission deems necessary to review and address the adverse effects on such employees.

D. Section 11347.

49 U.S.C. § 11347

When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45. Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period).